TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 583.

FRED L. DORR AND EDWARD F. O'BRIEN, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED FEBRUARY 11, 1904.

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1 Supreme Court of the United States, —— Term, 190–.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.

In error to the supreme court of the Philippine islands.

Proceedings had in the court of first instance of the city of Manila and the supreme court of the Philippine islands.

THE UNITED STATES
vs.
FRED L. DORR and EDWARD F. O'BRIEN.

Be it remembered that heretofore, to wit, on the 17th day of May, 1902, in the court of first instance of the city of Manila, came B. Legarda, and filed in the clerk's office of said court a complaint signed and sworn to by him, against Fred L. Dorr and Edward F. O'Brien, which said complaint is in the words and figures following, to wit:

THE UNITED STATES OF AMERICA,
Philippine Islands.

In the Court of First Instance of the City of Manila.

THE UNITED STATES OF AMERICA
vs.
FRED L. DORR and EDWARD F. O'BRIEN.

2 The undersigned accuses Fred L. Dorr and Edward F. O'Brien of the crime of libel, committed as follows: That on the 16th day of April, 1902, in the city of Manila, the said Fred L. Dorr and Edward F. O'Brien, pretending to publish a report of the proceedings of a trial pending in this court in which trial the undersigned was plaintiff and Vicente G. Valdés was defendant, the undersigned having testified as a witness therein, the accused published, wilfully, maliciously and with intent to damage the undersigned, and with respect to him, in the English language, a false and malicious libel, the heading of which libel is of the following tenor: "Traitor, seducer and perjurer," thereby meaning and giving to understand that the undersigned was all these things, and that he had committed the crimes of treason, seduction and perjury; against the statute in the case made and provided.

Manila, May 17, 1902.

(Signed) B. LEGARDA.

Subscribed and sworn to before me this 17th day of May, 1902.

(Signed) J. McMICKING, *Clerk.*

Filed in the clerk's office this 17th day of May, 1902.

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila, P. I.

3 That after the presentation of said complaint and on the said 17th day of May, 1902, said defendants were arrested and were thereupon released upon bond.

That thereafter and on the 20th day of May, 1902, a preliminary investigation was had in said cause before the Honorable William J. Rohde, judge of said court of first instance, the Honorable W. H. Bishop, prosecuting attorney of the city of Manilla, appearing in conjunction with the Honorable W. A. Kincaid, private attorney for Benito Legarda, as attorneys for the prosecution, and Messrs. Lamme, Montague and Dominguez appearing as attorneys for said defendants, and as a result of the said preliminary investigation said court decided that probable cause existed for the prosecution of said defendants, and said defendants were thereupon bound over to appear for trial before the said court of first instance.

That thereafter and on the 23d day of May, 1902, upon request of the prosecuting attorney leave was given to substitute an amended complaint in said cause, in the words and figures following, to wit:

THE UNITED STATES OF AMERICA, }
Philippine Islands. }

In the Court of First Instance of the City of Manila.

THE UNITED STATES OF AMERICA }
vs. }
FRED L. DORR and ED. F. O'BRIEN. }

The undersigned accuses Fred L. Dorr and Ed. F. O'Brien of the crime of libel, committed as follows: That on the 16th day
4 of April, 1902, in the city of Manila, the said Fred L. Dorr and Ed. F. O'Brien, pretending to make a report of the proceedings had in a trial pending before this court, in which Don Benito Legarda was plaintiff and Don Vicente G. Valdés was defendant, the said Don Benito Legarda having testified as a witness therein, wilfully and maliciously and with intent to injure the said Don Benito Legarda, published, with respect to the said Don Benito Legarda, in the English language, a false and malicious libel, which libel is of the following tenor:

"Traitor, seducer and perjurer."

"Sensational allegations against Commissioner Legarda."

"Made of record and read in English—Spanish reading waived—Wife would have killed him."

Thereby meaning and giving to understand that the said Don Benito Legarda was a traitor, seducer and perjurer, and that he had committed the crimes of seduction, treason and perjury, and that therefore his wife desired to kill him; and below the said libelous publication appears the following:

"Legarda pale and nervous."

Thereby meaning that he became so in consequence of the truth of the accusations referred to, it being the purpose of the accused to thus give an appearance of probability to the said libel, against the statute in the case made and provided.

Manila, May 23, 1902.

(Signed) DIONISIO CHANCO,
Assistant Prosecuting Attorney.

5 Filed in the clerk's office this 23d day of May, 1902.

(Signed) J. McMICKING,
Clerk of the Court of First Instance of Manila.

Copy of the foregoing complaint received this 24th day of May, 1902.

(Signed) LAMME, MONTAGNE & DOMINGUEZ,
Attorneys for the Defendants.

That thereafter and on the 9th day of June, 1902, said defendants appeared in said court and pled not guilty to the charge made against them.

That thereafter and on the 1st day of July, 1902, a change of venue was granted by said the Honorable William J. Rohde, one of the judges of said court of first instance, presiding over part —, transferring said cause for hearing to the Honorable Byron S. Ambler, one of the judges of said court of first instance presiding over part III of said court.

That thereafter and on the 24th day of July, 1902, a motion was made by said defendants demanding a trial by jury in said cause, under the provisions of article 6 of the amendments to the Constitution of the United States, which said motion was, on the 9th day of August, 1902, denied by the said presiding judge of said court, to which said ruling said defendants duly excepted.

That thereafter and on the 12th day of August, 1902, said
6 cause came on for hearing before the Honorable Byron S. Ambler, presiding over part III of the said court of first in-

stance of the city of Manila, the United States being represented by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands, John W. Haussermann, assistant attorney general of the Philippine islands, and Jesse George, assistant prosecuting attorney for the city of Manila; and the said defendants being represented by Mr. Augustus A. Montagne and Mr. Frederick Garfield Waite; and that thereupon a continuance was had until August 14, 1902.

That on said August 14, 1902, said cause came on for trial in the said last named court, with both said parties represented by the same counsel as last above stated, and the motion for a jury trial was again renewed and again overruled by said court, to which exception was duly taken.

That thereupon a demurrer was entered to the complaint in the said cause on the part of said defendants for the reason that the said complaint did not charge a public offense, which said demurrer was overruled by the said court, and to which ruling said defendants duly excepted; and that thereupon A. R. Dorr was introduced as a witness for the prosecution in said cause, and upon said A. R. Dorr's being duly sworn counsel for said defendants entered a motion objecting to the introduction of any evidence whatever in the said cause, and asking that said cause be dismissed, on the ground that the matter contained in the complaint in the said cause did
7 not constitute a public offense, which said motion was overruled by the court, and an exception to said action of the court was duly taken by said defendants; and thereupon and thereafter the following evidence was submitted to the court in the said cause:

A. R. DORR, a witness called on behalf of the prosecution, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAUSSERMANN:

Q. What is your name, occupation and residence?

A. A. R. Dorr, age 36 years, Manila, general manager of Manila Freedom.

Q. How long have you been manager of the Manila Freedom?

A. About a year and seven months; since the first of January, 1901.

Q. Since the first of January 1901?

A. Yes sir; 1901 was it not? (turning to other defendants for confirmation).

Q. Where is that paper published?

A. At 104 Calle Magallanes.

Q. In what city?

A. In the Walled city.

Q. Manila, Philipine islands?
A. Yes sir, Philippine islands.
Q. What kind of a paper is it?
A. It is a daily except Mondays.
Q. Where does it circulate?
A. It circulates in Manila, in the provinces, and in the United States.
Q. Provinces of the Philippine islands?
A. Yes sir.
8 Q. Who is the proprietor or publisher of the paper?

Mr. WAITE: I object to the question on the grounds that it calls for a conclusion of the witness, and on the further grounds that it asks a question of the witness that may tend to probably or possibly incriminate himself.

JUDGE: He might state if he knows, unless he claims his privilege.

Mr. MONTAGNE: We have the same objection to the question.

JUDGE: He has the right to claim his privilege if he desires.

Mr. MONTAGNE: May it please the court, as his attorneys in another case pending before the court, a criminal case, we desire the right or privilege of advising the witness. We ask the court for that privilege.

JUDGE: Advise him if you desire.

Mr. WAITE: I would prefer to have the court do so.

JUDGE: It is your right and privilege, Mr. Dorr, to not answer any question which you think may tend to incriminate you. That may be in any proceeding already advanced against you or in any contemplated.

WITNESS: I decline to answer the question.

The assistant attorney general here explains to the court that the question asked is simply whether he knows who is the proprietor of the paper, and that witness has already testified that he is the manager of the paper, so that there is nothing in the question that can in any way tend to incriminate the witness, whereupon
9 counsel for defendants show that witness is charged in the sedition case with being one of the responsible parties in the publication of a certain article. The question was withdrawn.

Q. State, if you know, what relationship the defendant Fred L. Dorr has with the paper known as the Manila Freedom.

Objection; overruled; exception.

WITNESS: I do not know that I care to answer.

The court rules that the witness may answer the question, to which ruling counsel for defendants except.

A. He is publisher of the paper; he occupies the position of proprietor.

Q. I will ask you to look at this and state what you have in your hands?

A. I have a file of the Manila Freedom for April, May and June, with the exception of a few days in June.

Mr. MONTAGNE: Of what year, Mr. Dorr?

A. 1902.

Q. Have you the Manila Freedom of April 16th, 1902?

A. Yes sir.

Q. Will you turn to it?

A. (Witness turns over files.) This is it (handing counsel copy of April 16th).

Q. Is that a copy of the paper of April 16th?

A. Yes sir.

Objection; overruled; exception.

Mr. HAUSSERMANN: I desire to introduce so much of the Manila Freedom of April 16th, 1902, publishing, "Traitor, seducer and perjurer. Sensational allegations against Commissioner Legarda made of record and read in English. Spanish reading
10 waived. Wife would have killed him. Legarda pale and nervous."

Mr. MONTAGNE: We object to the offer to introduce a distinct part of that paper or document. If they want it for any purpose it is entitled to and should go into the record in its entirety, in order that this court may be advised or any other court that might have jurisdiction over the case, and we contend that they cannot segregate a portion from an instrument and eliminate the rest. The instrument must go in in its entirety.

Mr. HAUSSERMANN: I desire to withdraw that and introduce the entire article on the first page under the words "Traitor, seducer and perjurer," including the words just mentioned, "Traitor, seducer and perjurer," marked State's Exhibit "A," for the purpose of identifying the copy, and I will ask the witness if that is a copy of the paper the Manila Freedom of April 16th, 1902.

A. Yes sir.

Mr. HAUSSERMANN: I hand to the stenographer that part of the page 1 of the Manila Freedom of April 16th, 1902, between the pencil marks, to be attached as part of the record, marked State's Exhibit "A."

I desire also to introduce that part of page 6 of the said paper dated April 16, 1902, containing on the editorial page the following words: "The Manila Freedom. Edward F. O'Brien, editor. An American paper advocating greater America. Published daily. Entered at the postoffice, Manila, P. I., as second class mail matter. Fred L. Dorr, proprietor, A. R. Dorr, general manager. Tele-
11 phone call, editorial rooms and business office, 116. Subscription.

	Gold.	Mex.
Single copy	$0.05	$0.10
One month	1.00	2.00
Six months	5.50	11.00
One year	10.00	20.00

Address: Editorial rooms and business office 104 Magallanes, Walled city. This paper is kept on file at E. C. Dake's agency, 64 and 65 Merchants exchange, San Francisco, California, where contracts for advertising can be made. Wednesday, April 16, 1902."

Admitted without objection.

Q. I will hand you this paper and ask you what it is?
A. It is a copy of the Manila Freedom of April 17th.
Q. 1902?
A. 1902.
Q. The paper of which you are general manager, the Manila Freedom?
A. Yes sir, the Manila Freedom.

Mr. HAUSSERMANN: I desire to introduce in evidence the article entitled "The allegations against Legarda," in the third column of the editorial page, page 6, of the Manila Freedom of April 17, 1902, identified by the witness as being a copy of the Manila Freedom of the said date, marked State's Exhibit "B;" also the editorial which is as follows: I had better read it:

Mr. WAITE: I object to its being read.

Mr. HAUSSERMANN: The editorial article containing seven lines, about the middle of column 4 of page 6, commencing with
12 the word "Taking," and ending with the word "tried," marked with red pencil marks; also that part of the first column of page 6, commencing with the word "the," the first word on page 6, and ending with the words, "Thursday, April 17, 1902."

Mr. WAITE: As to the introduction of all or any part of that, the defense objects on the grounds that it is incompetent, irrelevant and immaterial.

JUDGE: I suggest that you state the grounds of the objection.

Mr. WAITE: Upon the grounds that I stated, it is incompetent, irrelevant and immaterial to show anything contained in these articles of the 17th. By what can it be claimed that they constitute a part of the charge made against the defendants, or any of them? Are they competent to substantiate or supply a charge as against the article of the day before? which is the article in question that we are handling here under the law given us by the commission. There is only one thing that such evidence could be offered for, and that is proof of malice.

Mr. HAUSSERMANN: That is the very purpose of the introduction of these articles, to show actual malice, because the law says so. If

they claim it was privileged, it is to show actual malice, and in addition to that to substantiate the opening statement that the body of the article was not privileged, and therefore the head lines are not privileged. For that reason I ask to introduce that article.

The court then ruled that the article might be admitted for what it is worth, which is as follows: "Taking into consideration
13 the appearance of Commissioner Legarda at the Valdez trial day before yesterday, his paleness and nervous agitation, it would have been an easy matter to have mistaken who was being tried."

Q. I hand you this paper, and ask you to state what it is.
A. That is the Manila Freedom of April first, 1902.

Mr. HAUSSERMANN: I desire to introduce in evidence this copy of the Manila Freedom, April first, 1902, identified by the witness as being such, and commencing in column 1 of page 6 of the said issue of the Manila Freedom and ending with the words, "Tuesday, April 1, 1902."

Admitted without objection.

Mr. HAUSSERMANN: Also the third article in column 4 of the editorial page of the said issue, commencing with the word "advance" and ending with the word "commission," all embraced in blue pencil marks.

Mr. WAITE: I object to the introduction of the article as incompetent, irrelevant and immaterial, and presenting to the court the article itself for decision whether or not it is competent or relevant.

The court ordered the same admitted, and counsel for defendants excepted to the ruling of the court.

Mr. HAUSSERMANN: Now if it please the court, I desire to introduce in that same issue in the 4th column of page 1 of the said Manila Freedom, headed "The famous Miau case was heard yesterday," and continued on page 7.

Mr. WAITE: The offer is objected to on the ground that
14 the evidence is incompetent, irrelevant, immaterial, and does not have a tendency to show, does not make proof or tend to show in any way, malice.

Admitted, and counsel for defendants except to ruling of the court, marked State's Exhibit "C."

Q. Look at this paper and state what it is?
A. You have two here.
Q. Take this one.
A. This is April 5th, 1902; Manila Freedom, April 5th, 1902.

Mr. HAUSSERMANN: I desire to offer in evidence another paper, entitled "The Manila Freedom" of April 5th, 1902, identified by the witness as a copy of the Manila Freedom of April 5th, 1902, the whole of the first column on page 6 of the said issue, and also about one-fourth of the second column, being a continuation of the

article entitled "The Miau case," for the purpose of showing malice against the complaining witness, Benito Legarda, and to show knowledge of the defendants that the offer to prove the truth of the charge of April 15th was not allowable under the Spanish law under which that case was being tried.

Mr. WAITE: I object to the introduction of this paper, as incompetent, irrelevant and immaterial, and not proving or tending to prove,—it being an editorial comment in an entirely different case, concerning entirely different parties, and not germane or in common with the present case or parties before the court, and not proving or tending to prove malice.

Admitted, marked State's Exhibit "D," and exception
15 taken to the ruling of the court by counsel for the defendants.

Mr. WAITE: To save the time of the court we will admit that Fred L. Dorr is the proprietor, and Mr. O'Brien the editor of the Manila Freedom, and were, during the time covered by the charge, and during all of the time that counsel may desire to call attention to various articles.

Q. I desire you to state what that is that I hand you?
A. That's the Manila Freedom of April 6th, 1902.

Mr. HAUSSERMANN: I desire to introduce in evidence the issue of April 6th, 1902, that part of the editorial page, page 6, entitled "A few hard facts."

Objection; offer withdrawn.

Mr. HAUSSERMANN: I desire to offer in evidence from the records in case No. 513, against Vicente Garcia Valdez, page 41 of the testimony, which is page 135 of the record, page 42 of the testimony, which is page 136 of the record, and page 43 of the testimony, being page 137 of the record, and page 44 of the testimony, being page 138 of the record, including the comments of the court and the attorneys, which appear of record in these pages.

Mr. GEORGE: This is for the purpose of showing your honor that this offer to prove was made, not by an attorney of record, but by a bystander; that this libelous statement was not read by an attorney of record, but by a bystander. It was also made after strenu-
16 ous objections as to its being incompetent, and it is shown by the ruling of the court that it was not of record.

Admitted without objection.

It is admitted by counsel for defendants that the newspapers introduced are true copies of the respective issues corresponding to the various dates.

Mr. HAUSSERMANN: I further desire to read the article publishing the so-called offer to prove, and to compare it with the offer in the record.

Mr. MONTAGNE: That is the article which we admit was read in open court as the offer to prove on the part of the defense in that court.

Mr. HAUSSERMANN: I further desire to include and offer in evidence pages 86, 87, 88, 89 and 90, of the record in case No. 516, entitled The United States of America *vs.* D. V. G. Valdez.

Admitted without objection.

ARTHUR F. ODLIN, a witness called on behalf of the prosecution, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAUSSERMANN:

Q. State your name, official position, and residence?

A. Arthur F. Odlin, one of the judges of this court, Manila.

Q. Were you the presiding judge at the trial of the case entitled The United States *vs.* Vicente Garcia Valdez, and numbered 513?

A. Yes, but the number in my court was 88, criminal case
17 No. 88. That's No. 513 of the supreme court, I think.

Q. Is that the case?

A. No. 88 was the number of the case in my court.

Q. You presided in case No. 513 of the supreme court when it was on trial in your court?

A. Well, I presume it is No. 513; it appears to be No. 513 of the supreme court.

Q. I will ask you whether or not you presided in this case of which you now have the record (handing witness record)?

A. Yes sir, I presided at the trial of this case, and signed the judgment on the 6th of May.

Q. Was Commissioner Benito Legarda a witness in this case?

A. Yes sir.

Q. For the defense?

A. I think the defense summoned him; I am pretty sure they did.

Q. Was he on the stand?

A. Yes sir.

Q. State to the court what his manner and demeanor was at the trial, while on the stand or present at the trial?

Objection; overruled; exception.

A. Mr. Legarda was on the stand a very short time. As I remember it, only three or four questions were put to him. I did not notice anything unusual. He seemed to me to appear about as any ordinary witness that I have observed testifying before my court.

Q. Did you observe or notice any nervousness on his part?

Objection; question withdrawn.

18 Q. State to the court his manner and appearance while in the court room and on the stand on the 16th day of April last.

Objection as asked and answered, and on the further ground that it is immaterial.

JUDGE: You may ask him if he observed anything further.

Exception noted.

Q. Did you notice anything further about his manner, appearance or demeanor?

A. I do not think I can answer that question any differently from stating that I do not know Mr. Legarda intimately. Of course I have seen Mr. Legarda various times since I have been in the Philippine islands, and if there was anything unusual in his attitude on that day I did not observe it. If there was anything unusual in his appearance or manner that day I did not observe it.

Q. State if you know whether or not Commissioner Legarda was present in the court room or on the stand when Mr. Lamme read to the court the allegations which he offered to prove?

Objection; overruled; exception.

A. I am very sure Mr. Legarda had left the stand, and I think I saw him go out of the door of the court room. I would not swear to that positively, but I have a very strong impression that I saw Mr. Legarda take his hat and leave the court room as soon as he left the stand; that he did not remain a minute; that he asked me if I needed him any more. Certain evidence was excluded, and I told him that I did not, and my recollection is that I saw him take his hat and leave the court room. I am not absolutely certain about that, but that's my impression.

19

Cross examination.

By Mr. MONTAGNE:

Q. Did you read the article in the Manila Freedom of the date of April 16th of this year, in which was contained a statement of the occurrences in your court of the 15th?

Objection; sustained; exception.

FELIPE CALDERON, a witness called on behalf of the prosecution, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAUSSERMANN:

Q. State your name, occupation and residence?

A. Felipe Calderon, 92 Calle Nueva, Ermita, office 361, Jolo, occupation lawyer.

Q. Were you the counsel for the prosecution in the trial of the case before Judge Odlin, in Judge Odlin's court, entitled "The

United States *vs.* D. Vicente Garcia Valdez," criminal case 513, of which I hand you the record?

20 A. Yes sir, I was the lawyer employed by Mr. Legarda.

Q. Were you present in the court room during the trial on the 16th day of April, 1902, the day that Benito Legarda was on the stand for the defense?

A. I was present at the very session.

Q. The 15th, I should say?

A. Yes sir, I was present at all sessions of the trial, and I was there present on the day Mr. Legarda went on the stand to testify as a witness, He was subpœnaed and appeared before the court.

Q. State whether or not Mr. Legarda was either on the stand or in the court room at the time Mr. Lamme read to the court a series of allegations which he offered to prove.

Objection; overruled; exception.

A. No sir, Mr. Legarda was not present. Mr. Legarda was subpœnaed to appear as a witness. He was on the stand but he did not testify to anything, in view of the fact that every question put to him by counsel was objected to.

Motion to strike out the latter part of answer as incompetent, irrelevant and immaterial, and not responsive to the question; sustained; exception noted.

Q. On the 15th day of April, when Mr. Legarda was in the court room or on the stand testifying, state, if you know, what his demeanor was while in the court room, and appearance, as far

21 as you know?

Objection; overruled; exception.

A. I have not noticed anything unusual about him; he was as usual. I did not observe anything unusual about him.

Cross examination.

By Mr. MONTAGNE:

Q. You were employed by Legarda as a private counsel to prosecute on his behalf in the case referred to that was tried before Judge Odlin on the 15th of April?

A. I was engaged to represent Mr. Legarda in this case, as the law does not allow the prosecuting attorney to interfere in a case of that kind.

Motion to strike out latter part of answer as not responsive; sustained; exception noted.

It is admitted that the paper that counsel now holds in his hands is a copy of the Manila Freedom of March 28th, 1902.

Mr. HAUSSERMANN: I desire to introduce in evidence that part of column 3 on the editorial page, page 6, of the issue of March 28th,

as follows: "The charges made by Valdez against Commissioners Legarda and Pardo de Tavera have every evidence of being true and it is stated by the attorneys representing the defendant and by the defendant himself that he wants nothing more than a chance to be allowed to prove the truth of his article. The prosecution has not officially denied the truth of the allegations of Valdez, and it
22 is a matter of common comment among Spaniards and others who are acquainted with the facts of the case that the charges are true. Following is a copy of the article in Miau, upon which Commissioner Tavera bases his cases."

Mr. WAITE: I object to the introduction of this as incompetent, irrelevant and immaterial, and secondly, on the ground that if they desire to offer it at all, or if it is admitted by the court it should be the full article; thus the court will be able to judge the full intent of the article.

Mr. HAUSSERMAN: My purpose in not introducing the whole article was to avoid error. I can readily see that it would not be proper to mingle in this court publications which are claimed to be libelous, and to avoid that I only offered this portion.

The assistant attorney general here asked the court to leave the matter in abeyance, until such time as counsel may have time to look up authorities in support of their respective contentions, and the court so ordered.

J. MCMICKING, a witness called on behalf of the prosecution, being first duly sworn, testified as follows:

Direct examination.

By Mr. HAUSSERMANN:

Q. State your name, occupation and residence.

A. J. McMicking, clerk of the court of first instance, Ma-
23 nila, 24 years of age, residence 234 Calle Magallanes, Manila.

Q. Did you give your occupation?

A. A clerk of the court of first instance of Manila.

Q. How long have you been clerk of this court?

A. For more than a year; ever since the courts were created.

Q. Have you a record of the filing of criminal cases in the court of first instance of this city?

A. Yes sir.

Q. State, if you know, what cases known as libel cases were pending in the court in the month of February which concerned any of the native commissioners of the United States Philippine Commission.

Objection; question withdrawn.

Q. Refer to the record and state what criminal cases known as libel cases were pending in the court of first instance of this city in

which any of the native members of the United States Philippine Commission were concerned or involved.

Objection, as incompetent, irrelevant and immaterial, and not the best evidence; that the record is the best evidence. Objection sustained.

Q. You speak of having a record of the criminal cases; state to the court more fully what that record is.

A. That record is called the registro general, general register, of all the criminal cases filed in the court of first instance of
24 Manila.

Q. Between what dates?

A. Between the 25th of June of last year up to this date.

Q. From the 25th of June, 1901?

A. Yes sir, and upward.

Q. Up to this date?

A. Yes sir.

Q. Does this record show all the criminal cases filed and pending in this city between these dates?

A. Yes sir, every one of them.

Mr. HAUSSERMANN: I now introduce the record of the criminal cases in the court of first instance, which is described as the "Juzgado Primera Instancia, Registro General."

Objection as not being of itself a record, but simply an index or transcript; this book is not evidence; the record is the evidence.

Q. Do you say that this is the record of the criminal cases filed in this court?

A. It is the general register of the cases.

JUDGE: Is the keeping of this book required of the clerk by law?

A. Yes sir.

JUDGE: Is it kept from day to day, as cases are filed?

A. Yes sir.

Q. It is really a book of original entry, is it not?

A. Yes sir.

JUDGE: You say that this book contains all the cases?

A. Yes sir.

Q. No other cases?

A. No others.

Q. Does it show the date of the filing?

25 A. It shows the date, and the name of the plaintiff and defendant.

Pages 1 to 18 of the book Registro General introduced in evidence, and marked State's Exhibit "E." Objection as to page 18; overruled; exception.

Mr. GEORGE: We offer now in evidence page 153 and the following two pages without number of the record in case No. 513, supreme court of the Philippine islands, entitled The United States and Don

Benito Legarda *contra* Vicente Garcia Valdez, all the record in that case subsequent to the judgment of the lower court, the judgment of Judge Odlin. While counsel is looking at it, I will state that this is for the purpose of showing that after having cumbered the record with this offer of proof, this shows that the defendants in that case never offered to appeal the case to the supreme court.

Objection.

JUDGE: The bent of my mind is that this is not competent testimony, unless the prosecution intends to follow it up by showing that the defendants had knowledge of the fact, thus connecting them with it. As you have not stated that you proposed to connect the defendants with the fact of appeal not being taken, I do not think it competent.

Exception noted.

Mr. HAUSSERMANN: If the court please, subject to the ruling of the court on the evidence already offered, the prosecution rests.

26 Counsel for the defendants here stated that they desired all evidence of the prosecution in its entirety before the defense would proceed, and the question formerly raised as to the admissibility of the portion of the article of March 28th was then taken up and argued, whereupon the court ruled that the portion so offered might be admitted, to which ruling the counsel for defendants excepted.

Mr. MONTAGNE: I desire to ask that this case be dismissed and the defendants discharged, for the reason, first, that the evidence before the court does not show that any public offense has been committed, and secondly that the evidence before the court is not sufficient to hold or convict the defendants of the crime charged, or of any crime.

JUDGE: I do not care to hear from the prosecution now; as at present advised, I think it has been shown that there was an offense committed.

The question was then argued by Mr. Montagne, and the court adjourned until 9 a. m. August 15th, 1902.

AUGUST 15, 1902—Morning Session.

The arguments upon the previous question continued, and the court overruled the motion to dismiss, to which ruling counsel for defendants excepted.

Defense.

MARTIN EAGAN, a witness called on behalf of the defense, being first duly sworn, testified as follows:

27 Direct examination.

By Mr. WAITE:

Q. What is your name, occupation and place of residence?
A. My name is Martin Eagan, newspaper reporter, residence New York city,
Q. What if any occupation or employment or position do you now hold in the Philippine islands?
A. Agent in the Philippine islands for the Associated Press of the United States of America.
Q. How old are you?
A. 30 years' old.
Q. How long have you been associated with newspaper work?
A. I am entering upon my 15th year.
Q. Have you ever held any editorial position in connection with newspapers?
A. Yes sir.
Q. Have you ever held any other reportorial position where headlines, the methods of calling the attention of the public to the contents of an article were made by you?
A. I have.
Q. Is there an understood object and method among the best newspapers in the preparation of headlines or catchy methods of calling the attention of the public to the contents of an article?

Objection; overruled; exception noted.

A. There is.
Q. State what that recognized custom or method is?

Objection; sustained; exception.

Q. Have you read and considered the article published in the Manila Freedom, dated April 16th, 1902?
A. I have read it.
28 Q. Have you considered it from the standpoint of a newspaper man, from the newspaper point of view?
A. I have.
Q. Have you compared that article with the headlines of the article?
A. I have.
Q. In your opinion, as a newspaper man of about fifteen years' standing, do you consider, or do you not consider that the words

used in the headlines are a legitimate newspaper deduction from the text of the article, and such deduction as would be made in accordance with the best newspaper custom and usage?

Objection; sustained; exception.

Mr. WAITE: The defense here offers to prove by this witness that it is the custom——

Mr. WILFLEY: I object to your putting anything in the record. If you want to ask anything of the witness, ask your questions in the usual way and let the court pass upon it.

Objection sustained; exception.

Q. State if in reading and considering the article in the Freedom of April 16th of this year, as a newspaper man, you formed an opinion of the character of the headlines, whether they were germane and proper, and embodied a fair text of the article itself.

Objection; sustained; exception.

Q. Do you, as a newspaper man familiar with the custom and usages of the best newspapers in the preparation of head-
29 lines and the methods of so doing, after reading the article, consider the article in the Manila Freedom of April 16, 1902, that any implication whatever of malicious intent can be drawn from the caption or headlines of this article, and whether or not the headlines and caption complained of are a fair and reasonable deduction from the body of the article itself?

Objection; sustained; exception.

Q. What is the general purpose and motive among newspaper men of the best class, connected with substantial papers in the preparation of headlines?

Objection; sustained; exception.

Q. Have you ever had any conversation with Mr. O'Brien as to his purposes and motives in writing the article complained of, the article in the Manila Freedom of April 16th, 1902?

A. I have.

Q. When and where, and under what circumstances?

Objection as to "under what circumstances;" sustained; exception.

Q. When?

A. Within a week or so, within a couple of days.

Motion to strike out; no ruling.

Q. In that conversation did Mr. O'Brien state to you his object, purposes and motives in writing the article referred to?

Objection; sustained; exception.

30 Q. What is the custom among newspaper men, the best newspaper men, in the preparation of headlines for articles?

Objection; sustained; exception.

Court here adjourns until 3 o'clock p. m. this date.

AUGUST 15, 1902—Afternoon Session.

DABNEY MINOR MICKEL, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. WAITE:

Q. Please state your name, residence and occupation?
A. Dabney Minor Mickel, newspaper reporter, Manila.
Q. Were you connected with the newspaper the Manila American during the month of April last, and prior thereto?
A. I was.
Q. What special branch of their work did you have charge of?
A. The court work.
Q. Were you present at the hearing of the case on April 15th of this year, before Judge Odlin, in the case of The United States *vs.* Señor Valdez for libel against Commissioner Legarda?
A. I was.
Q. Will you look at this paper which I show you now, and tell me what it is?
A. That is a copy of the Manila American.
Q. Of what date?
A. April 16th.

31 Q. Will you look at the leading article on the first page and state if you know who wrote it?

A. I wrote it.
Q. Is that the report of the proceedings of the court as made by you to your paper?

Objection; overruled; exception noted.

A. It is.

Mr. WAITE: I desire to offer in evidence a copy of the Manila American dated April 16th, 1902, and especially that part of it contained in the first two columns of the first page, and part of the third and fourth columns, beginning with the heading, "Are these things true," and ending, "By agreement the case was continued until 3 p. m. Friday, when arguments will be heard."
Objection; sustained; exception.
Mr. WAITE: I offer to prove by the introduction of this paper that the Manila American of the date of April 16th, 1902——
Objection; sustained; exception.

Q. Did you notice Señor Legarda in the court room that day?
A. I did.
Q. Had you known him before?
A. Yes sir.
Q. What was his appearance and demeanor on that day as compared with his usual habit and demeanor?
A. Well he appeared embarrassed; he was nervous.
Q. Did you read the article in the Manila Freedom of the date of April 16th, 1902, purporting to be a report by the Manila
32 Freedom of the proceedings in the case referred to, The United States *vs.* Vicente Valdez, before Judge Odlin in the Legarda matter?
A. I think I did; it is rather long ago, and I have not a clear recollection of it, but I read it at the time.
Q. Have you read it since?
A. No sir.
Q. Do you remember the purport of the article?
A. I think I do.
Q. What, if any, impression was formed on your mind by that article at the time of its publication, both as to the headlines and as to whether it was a truthful report of the proceedings of the court, and as to whether there was anything in the article itself or in the headlines of the article that were malicious or intentional.

Objection; sustained; exception.
Mr. WAITE: The defense now offers to prove by this witness——
Objection; sustained; exception.

FRED L. DORR, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. WAITE:

Q. What is your name, residence and occupation?
A. Fred L. Dorr, Manila. I am a contractor.
Q. Are you one of the defendants in this case?
A. Yes sir.
Q. Were you the proprietor of the Manila Freedom
33 on April 16th of this year?
A. I was.
Q. Who was in responsible editorial control at that time?
A. Mr. O'Brien.
Q. What, if anything, did you have to do with the direction of the policy of the paper or the character of the articles inserted?

Objection; sustained; exception.

Q. Mr. Dorr, do you know Mr. Benito Legarda?

A. I don't think I would know him if I saw him.
Q. Did you know him on the 16th day of April of this year?
A. Not any more than I do now. I wouldn't know him if I saw him.
Q. Did you know him at all on the 16th day of April?
A. I did not, and would not have known him if I saw him.
Q. Did you then have any malicious feeling of any character towards Mr. Benito Legarda?
A. Absolutely none at all sir.
Q. Had you reasons to have such a feeling against him?
A. None whatever.
Q. Have you such malicious feeling now or at any time?
A. I do not have now, and never had.
Q. Did you write the article contained in the issue of the Manila Freedom of April 16th, which is the subject forming the basis for this prosecution?

Objection; overruled; exception noted.

A. No sir, I did not write it.
Q. Did you write or give any help to write an editorial
34 article in the Manila Freedom before now introduced in evidence by the prosecution in this case?

JUDGE: That question is improper.

Q. Did you write any of the articles or editorials contained in the Manila Freedom between March 26th of this year and April 17th that have been introduced by the prosecution as evidence in this case?

Objection; overruled; exception noted.

A. No sir, I never wrote anything for the Freedom at any time.

EDWARD F. O'BRIEN, called as a witness on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. WAITE:

Q. What is your name, residence and occupation?
A. Edward F. O'Brien, Manila, newspaper man.
Q. Were you engaged in the newspaper business in the month of April of this year?
A. I was.
Q. With what paper and in what capacity?
A. The Manila Freedom, as editor.
Q. During the period from March 26th, 1902, to April 17, 1902, who was the managing editor, if you know, of the Manila Freedom?
A. I acted in the dual capacity as editor and manager of it.

35 Q. Who was the editor, the responsible editor, who had the decision as to the policy of the Manila Freedom during the period mentioned?

A. I did; I was responsible, and had the decision.

Q. Did you personally write that article in the Manila Freedom of April 16th, which forms the basis of the prosecution in this case?

A. I did not.

Q. Do you know by whom it was written.

A. I do.

Q. Who was it?

A. A reporter by the name of Edgar T. Vogles, who handed it to me.

Q. Did you have at that time any regular reporter whose business it was to cover that part of the work?

A. I did.

Q. What instructions, if any, did he have from you during that time?

Objection; question withdrawn.

Q. During the period referred to, what were your instructions as to the reporter providing your court news?

A. Regarding the collection of news, firstly, the news. I have typewritten instructions, which I have posted in the office.

Objection as giving the contents of a paper; no ruling.

WITNESS: That answers it partially. In addition to that I gave my reporters personal instructions to handle all cases, and especially the court reporter, to eliminate all personal opinions; to simply state the facts as they occurred in court and to handle and publish only matters which are of record in cases which are filed; they
36 were not to appear until they were filed in court as a matter of record. I instructed all my reporters to handle all matters just as fairly as possible. I had only one man to cover all the courts in the city, and it was sometimes very difficult for him to properly cover all the courts. For that reason the reporter had to depend a great many times on what the clerks or the judges would tell him. However, at this time the reporter I believe was present in the court, and wrote and observed all that he saw in the court.

Q. Do you know Benito Legarda?

A. I do not; I never saw him.

Q. Had you ever seen him on the 16th day of April, 1902?

A. I had not to my personal knowledge. I have never seen him to my personal knowledge. I would like to change my other answer, and state that I have never seen him to my personal knowledge.

Q. Would you know the man if you saw him?

A. I would not.

Q. Did you during the time from March 26th, during which time

several articles have been presented by the prosecution in this case, were you actuated by any malice towards Benito Legarda?

A. Absolutely none.

37 Q. Did you ever have any such malice at any time, or have you such malice now?

A. At no time have I ever had an iota of feeling against him.

Q. Did you have any feeling towards him in one — or another?

A. No, only the sentiments which a newspaper man has, a desire to present the truth, the facts, to the public.

Cross examination.

By Mr. HAUSSERMANN:

Q. What is your age?

A. 26.

EDGAR T. VOGLES, a witness called on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. WAITE:

Q. What is your name, age, residence and occupation?

A. Edgar T. Vogles, 28, Manila, newspaper reporter.

Q. With what paper in the city of Manila, if any, were you connected on the 16th day of April, 1902?

A. The Manila Freedom.

Q. In what special capacity, if any?

A. Court reporter.

Q. Were you present in the branch of this court presided over by Judge Odlin on the 15th day of April, 1902, during the proceedings in a case wherein The United States was plaintiff and Señor Valdez was defendant, growing out of the publication by Miau of certain matter as concerning Benito Legarda?

A. I was.

Q. Have you seen the article published in the Manila

38 Freedom on the date of April 16th, 1902, relative to that court transaction?

A. I have seen it; I wrote it.

Q. Was or was not that a truthful account of the occurrences in the court on the 15th of April?

Objection; sustained; exception.

Q. Is the article of April 16th in the Manila Freedom, which is made the basis of this prosecution, is that a correct statement of what occurred in the court on that date?

Objection; sustained; exception.

Q. Who wrote the headlines of the article to which I refer, of the 16th of April, published in the Manila Freedom?

A. I could not swear to that; it might have been Mr. Smith, it might have been Mr. O'Brien. All I had to do with it was I wrote the article and laid it on his desk. I could not swear about who wrote the heading of it.

Mr. O'BRIEN: If it is necessary I will admit that I wrote the headlines.

Mr. HAUSSERMANN: I object to the form of the admission.

Mr. O'BRIEN: Then I will admit that I wrote it.

Q. In the preparation of that article as written by you for the Manila Freedom on April 16th, were you actuated by any malice or ill feeling towards Benito Legarda?

A. None whatever.

Objection; no ruling.

Q. Do you know Señor Legarda?

39 A. I have seen him in the corridor of the palace, but that was the first time I ever saw him to know who it was; but I saw him going from the palace once or twice.

Q. What were your instructions from Mr. O'Brien as managing editor of the Freedom as to the character of your court work.

Objection; overruled; exception noted.

A. My instructions when I went on the paper were that when I wrote an article up I should never put my own personal opinion in the article. I should always write it just as I got the facts in the court room. That I should never allow any persoual animosity or personal opinions which I had enter into the article, nor personal opinions. It was just to be the proceedings and nothing else.

Q. Did you have any relations with Mr. O'Brien relative to this article?

A. No, I do not think I did in regard to this article, this particular case, but his instructions were definite in regard to all cases.

Q. Did you notice Benito Legarda in court that day?

A. I did.

Q. What was his general appearance and demeanor, as compared with his ordinary demeanor.

Objection; sustained; exception.

Q. What was the appearance and demeanor in court that day of Mr. Benito Legarda?

40 A. He appeared to me very nervous, very much embarrassed, when he took the stand.

Cross examination.

By Mr. HAUSSERMANN:

Q. What did you notice that caused you to think that he was nervous? What did he do?

A. Well when he sat down there why he sat there with his hat; he kept turning it and twisting it and fidgeting around, as though he was very nervous, and I should judge that he was in a very nervous, embarrassed condition.

Q. Nothing more?

A. He sat down alongside of his counsel and consulted with him, and immediately got up and went out. He did not wait half a minute. I do not think it was more than that after he left the stand; he did not wait to hear the proceedings.

Q. How long was he in the court room?

A. As near as I can recall about 15 minutes.

Q. Was that immediately after he left the stand that he went out?

A. Yes sir, almost immediately after he left the stand.

Q. Were you in a better position to observe Señor Legarda than the court who was listening to his testimony, do you think?

A. Well, I cannot say that I was; but I was close enough to see and hear and write down what it was.

Q. Señor Legarda was on the witness stand was he not?

A. Yes sir.

41 Q. Did you write all that article?

A. All except what I copied verbatim from the court record.

Q. That you copied?

A. Yes sir.

Q. Who gave it to you to copy?

A. I cannot say for sure whether I got it from the record after, or from the carbon copy of the attorneys.

Q. That's what I want to know. Where did you get it, as a matter of fact?

A. I do not know now, I tell you. I did not get the article until it was of court record.

Q. Did you get it in the court room?

A. I don't know now whether it was in the court room or back in that little room of Judge Odlin's.

Q. Now is it not a fact that you did not copy that from the court record?

A. I cannot say whether I did or not; Judge Odlin told us that he would let us copy it.

Q. Well, did you copy it from the court record?

A. I am not sure whether I did or not, as I told you before.

Q. Why do you mention about a carbon copy?

A. Because I saw a carbon copy there, on the table where the attorneys were trying the case.

Q. What attorneys?

A. There was three of them; Mr. Montagne, Mr. Lamme and Señor Calderon.

Q. How many copies did you see?

A. The one I saw lying on the table.

Mr. MONTAGNE: We object to that line of questions on the
42 ground that it is incompetent, irrelevant and immaterial, and we particularly object to the manner of counsel in menacing the witness and standing right close beside him, with his finger pointed near his face and asking questions. We except to the actions of the attorney.

JUDGE: The objection is overruled. The court states that there is nothing improper or wrong whatever in the manner of the attorney.

Exception noted.

Q. Now state to the best of your knowledge where you got that report.

A. I have already stated that I was not sure whether I got it from the court record, or whether I got it from the carbon copy that the attorney had at the table.

Q. Where did you copy it from?

A. I would not try to state, because I might say one way, and it might turn out to be the other way.

Q. Is it not a fact that you are sure that you did not copy it from the court record?

A. It is not, because I have already stated that I did not swear. What I can swear is that it was already of court record and Judge Odlin told me I might copy it.

Q. You asked Judge Odlin if you might copy it, did you?

A. After the court adjourned in the afternoon we went into Judge Odlin's office, and he said that it was a matter of court record now, and we might have it.

43 Q. How many carbon copies did you see?

A. I saw one.

Q. Did you see any more?

A. No.

Q. How many reporters were there?

A. Three I think; that is, including me, I think there was four.

Mr. A. A. MONTAGNE, counsel for defendants, called as a witness on behalf of the defense, being first duly sworn, testified as follows:

Direct examination.

By Mr. WAITE:

Q. Are you one of the firm of Lamme, Montagne and Dominguez, attorneys in this city?

A. I am sir.

Q. Were your firm attorneys for Mr. Valdez in the case tried on the 15th of April last in Judge Odlin's branch of this court, wherein The United States was plaintiff and Mr. Valdez defendant?

A. It was sir.

Q. Was the offer to prove certain facts in that case introduced in record on that date in that case prepared in your office?

A. I am not certain of the date. I only know from reference to the record, but from my own knowledge at present I do not remember the date. But the day when the offer to prove was filed and read, written off and filed and read, on that day the original was offered and read to the court and filed in the record.

44 Q. Was that prepared in your office?

A. It was prepared in my office either that day or the day before. My best recollection is that it was the same day.

Q. How many copies were there in existence?

A. To my best recollection there was an original and two copies.

Q. What became of these?

A. My best recollection is that the original was filed with the papers in the case. The two copies were on the table of the attorneys. One of the copies was handed over to the attorney for plaintiff, and the other was our office copy, which we took away to our office.

Q. When you say "plaintiff's attorney" you mean Señor Calderon?

A. Señor Calderon; and the other was our office copy, and we took it back with us. We always have a copy in the office.

Cross examination.

By Mr. HAUSSERMANN:

Q. You say you took it back?

A. Yes sir.

Q. You say that to the best of your recollection you put that on the table and the attorney for the plaintiff got one of them?

A. I did not say anything of the kind. I said to the best of my knowledge and recollection, as to the number one I remember filing, and my best recollection is that one copy, which is, I believe,

45 usually served on opposing counsel, we served in the court room on the opposing counsel. The other copy is for counsel's own personal use, and which we always have with us, in court and out.

Q. As a matter of fact you will not state to the court that you are absolutely certain what became of these other two copies other than the original?

A. Well, I can state it with that degree of certainty which a person can state of matters which have transpired long since. I can state it with that degree of certainty, not with any mathematical degree of accuracy, perhaps. I say one was served on opposing counsel in the court, and the other copy was retained by us.

Counsel for defendants here announce that the defendants rest.

STATE'S EXHIBIT "A."

Traitor, seducer, and perjurer—Sensational allegations against Commissioner Legarda—Made of record and read in English—Spanish reading waived—Wife would have killed him—Legarda pale and nervous.

The Legarda-Valdez libel case was called in the court of first instance yesterday morning at nine o'clock pursuant to adjournment the day before.

As some of the testimony presented by the prosecution
46 had alleged that Señor Valdez spoke English and knew that Señor Fergusson had introduced him to Commissioner Moses as the editor of "Miau," Attorney Dominguez went on the stand as a witness for the defense. He stated to the court that though he was Senor Valdez's attorney he was not aware that his client spoke more than a few words of the English language. He said that if he was introduced to a man, he knew from the gestures made that he was being introduced, and could acknowledge it. Sheriff Peterson also was a witness for the defense along the same lines. His testimony corroborated that of Mr. Dominguez. A recess of a few minutes was then declared while Commissioner Legarda who had been sent for appeared in the court room.

When Señor Legarda finally appeared, he took his seat alongside his counsel, Attorney Calderon. He was somewhat pale and appeared slightly nervous. He went to the stand and took his seat in the witness chair. Judge Lamme, for the defense, then arose to interrogate him. The first question asked was:

Q. What is your name?

A. Benito Legarda.

Q. Where do you live?

A. 195 Calle San Sebastian.

Q. Where were you residing in March and April, 1898?

The prosecution at once put in an objection to the question, which objection was upheld by his honor. Judge Lamme then changed the question somewhat, and asked:

Q. Were you a commissioner during August and September, 1901?

47 A. Yes, from September the first.

Q. Where did you reside during March and April, 1898?

The prosecution again objected to the question. His honor asked Judge Lamme if he desired to argue the question. Judge Lamme explained that he did not; that he was only leading up to what he desired to get at; that he fully agreed with the judge in his ruling the question out.

Q. Do you know anything of the government known as the Malolos government? was the next question asked.

Again this question was objected to by the prosecution. Judge Lamme then stated that he only wanted to have the questions appear on the records of the court; that the defendant could, and was willing to prove the charge made against the prosecuting witness. He stated that he had drawn up a list of the allegations which were contained in "Miau" and with the court's permission would read them. The prosecution objected as they were in the English language. Judge Lamme then stated that Mr. Montagne also had a duplicate set of the allegations, written in Spanish, which he would read for the benefit of the prosecution after he, Judge Lamme, had finished those in English. Judge Odlin gave his consent and the following was read:

The defendant, not admitting that he was either the author, publisher, printer, or proprietor of the paper in which the article complained of was published, now offers to prove and show the
48 truth of all the allegations set forth in said article, and more particularly the following facts:

1. That Benito Legarda, the complaining witness, is a native of the Philippine islands.

2. That the said Legarda was, at the time of the publication of said article, and still is, a member of the United States Philippine Commission, one of the highest, most important, and responsible positions in the Government of the United States in the Philippine islands.

3. That at the time of the marriage of said Legarda, his wife was a widow and the mother of a daughter of about — years of age, named Doña Teresa Tuason; that said Doña Teresa was taken into the family of said Legarda, as a member of such family, and said Legarda in all things owed to her the same care and protection as to one of his own children, but that when the said Doña Teresa arrived at the age of about twenty years, the said Legarda seduced the said Doña Teresa, and upon the facts becoming known to his wife, she, the said wife, became so enraged at the lewd, lascivious and licentious conduct of her husband, the said Legarda, that she made a desperate but futile attempt upon his life.

4. That at about the time of the outbreak of war between the United States and Spain, the said Legarda made loud and boisterous protestations of his loyalty to the Spanish government, and joined, and became an officer of, a company of volunteer soldiers, and as such an officer took an oath of allegiance to the Spanish government, whereby he solemnly swore to protect and defend the
49 said government against all its enemies, foreign and domestic. That afterwards the said Legarda deserted the said volunteers and joined the insurgents, the enemies of Spain, thereby, on account of said oath of allegiance, adding the crime of perjury to the dual crime of treason and treachery.

5. That there was a government organized at Malolos in opposition to the duly constituted authorities of the Philippine islands and said Legarda fled to Malolos, the capital of the said govern-

ment, but the conservative influence of MacArthur's guns calmed his martial spirit, and he abandoned the sword, and became a financier instead of a cavalier.

6. That the said Legarda became the secretary of finance of the said Malolos government in opposition to the duly constituted authorities of said Philippine islands, and became a prominent, active, and malignant enemy of the United States.

7. That the advance of the American arms having shown that America would be successful in the conflict, thereupon the said Legarda, instead of remaining loyal to the Malolos government, fled to the American lines, and performed such acts of treachery while acting in the official position above mentioned as to procure a sentence of condemnation by the said Malolos government upon him, for treason.

8. That the said Legarda voluntarily took the oath of allegiance to three separate, distinct and hostile governments within the period of eighteen months, and each of which governments, at the time of his taking said oath, was at open war with the other; and that the said Legarda violated two of such oaths within a period of eight months and in each instance fled direct to the armed enemy of the government to which he had formerly sworn allegiance.

9. That the said publication of the article complained of was made in the public press of the city of Manila, not maliciously, but for the sole and only purpose of showing to the people of the Philippine islands and of the United States, the character of said Legarda, and his total unfitness for the official position he was then, and is now, occupying.

As the reading was about finished Attorney Calderon again entered a protest. However, the reading of the paper was finished. Mr. Montagne then arose and was preparing to read the Spanish translation when the prosecution announced that they waived the reading of the Spanish. Both papers were made part of the records of the case.

His honor asked if all the testimony was in. Both sides answered in the affirmative. Next Friday afternoon at 3:00 o'clock was the time set for arguing the case.

STATE'S EXHIBIT "B."

Taking into consideration the appearance of Commissioner
51 Legarda at the Valdez trial day before yesterday, his paleness and nervous agitation, it would have been an easy matter to have mistaken the man who was being tried.

The Manila Freedom. Edward F. O'Brien, editor. An American paper advocating Greater America. Published daily. Entered at the post-office, Manila, P. I., as second class mail matter. Fred L. Dorr, proprietor; A. R. Dorr, general manager. Telephone call. Editorial rooms and business office, 116. Subscription:

	Gold.	Mex.
Single copy	$0.05	$0.10
One month	1.00	2.00
Six months	5.50	11.00
One year	10.00	20.00

Address editorial rooms and business office, 104 Magallanes, walled city. This paper is kept on file at E. C. Dake's agency, 64 and 65 Merchants' exchange, San Francisco, California, where contracts for advertising can be made. Thursday, April 17, 1902.

STATE'S EXHIBIT "C."

The Manila Freedom. Edward F. O'Brien, editor. An American paper, advocating Greater America. Published daily. Entered at the post-office, Manila, P. I., as second class mail matter. Fred L. Dorr, proprietor; A. R. Dorr, general manager. Telephone call. Editorial rooms and business office, 116. Subscription:

		Gold.	Mex.
52	Single copy	$0.05	$0.10
	One month	1.00	2.00
	Six months	5.50	11.00
	One year	10.00	20.00

Address editorial rooms and business office 104 Magallanes, walled city This paper is kept on file at E. C. Dake's agency, 64 and 65 Merchants exchange, San Francisco, California, where contracts for advertising can be made. Tuesday, April 1, 1902.

Famous Miau case was heard yesterday—Aguinaldo present but did not have to testify—Defense not allowed to prove truth of charges—Calderon would instruct Judge Rhode—Tavera case decision expected today

The trial of Sr. Vicente Valdez on the charge of libeling Dr. Pardo de Tavera, a member of the civil commission, by an article

which appeared last year in the satirical and serio-comic Spanish weekly paper "Miau," was commenced yesterday morning in the court of first instance before Judge Rhode and Mr. W. W. Brown and Sr. Genals, sitting as assessors. There was a large attendance of the public, who were more attracted, no doubt, by the presence of Aguinaldo, who had been subpœnaed as a witness in the case. Aguinaldo was present at the opening of the court, accompanied by an army officer. He was not placed on the stand, however, and the many who were curious to know what he had to testify in regard to the case were very much disappointed.

Sr. Valdez was represented by attorneys Montagne and
53 Dominguez and Dr. Tavera by Sr. Calderon and Sr. Juan Sumalong.

The first witness placed on the stand was Sr. Jose de Loyzaga, editor of "El Comercio," who said he had never presented anybody to Sr. Valdez as the editor of "Miau." Asked if Sr. Valdez was at a reunion of newspapermen held recently witness said he was, but on that occasion he represented the "Diario de Filipinas," Sr. Romero Salas representing the "Miau."

At this point Mr. Montagne intimated that he would not call Aguinaldo as a witness. Aguinaldo then left, accompanied by the officer in charge of him, bidding a dignified "buenos dias" to court.

Mr. Montagne said he was prepared to proceed and prove the truth of the statements contained in the alleged libelous article in "Miau."

Judge Rhode asked Mr. Montagne to cite any portion of the Spanish law which would admit such testimony as he proposed to call in proof of the statements as absolutely legal and pertinent. The court overruled such testimony.

After a short legal argument in Spanish the court allowed Sr. Calderon to call evidence in rebuttal of the testimony of Sr. Loyzaga that Sr. Valdez was not introduced at the press gathering as the representative of "Miau."

Domingo Franco was then placed on the stand and said he was present at a gathering of newspapermen at which Valdez was
54 present. Sr. Calderon was proceeding to examine the witness further when Mr. Montagne interposed, stating that the witness was referring to a different press gathering to that which Sr. Loyzaga had in mind when giving his evidence.

The court ruled the witness out on the grounds that it was not evidence in rebuttal.

Mr. Montagne said he had no evidence to offer except that which would go to prove the truth of the articles published, but the court having ruled that such testimony would not be legal or pertinent, the defense rested its case.

Sr. Calderon was proceeding to expound the law on the point when he was stopped by Judge Rhode, who said he was fully acquainted with the code in this regard.

Sr. Calderon then proceeded with his argument, which was delivered in Spanish. At the conclusion the court adjourned for lunch.

At the afternoon session Mr. Montagne addressed the court for the defense. He quoted several passages of law applicable to the case, and in regard to the admission of evidence proving the truth of the statements read the following passage from Cooley's Constitutional Limitations: "The radical effect of these rules, as it seems to us, consists in its assumption that the private character of a public officer is something aside from, and not entering into or influencing, his public conduct; that a thoroughly dishonest man may be a just minister, and that a judge who is corrupt and debauched in private life may be pure and upright in his judgments; in other
55 words, that an evil tree is as likely as any other to bring forth good fruits.

"No such assumption is false to human nature, and contradictory of general experience; and whatever the law may say, the general public will still assume that a corrupt life will influence public conduct, and that a man who deals dishonestly with his fellows as individuals will not hesitate to defraud them in their aggregate and corporate capacity, if the opportunity shall be given him. They are further interested in knowing what is the character of their public servants, and what sort of persons are offering themselves for their suffrages. And if this be so, it would seem that there should be some privilege of comment, and that privilege could only be limited by good faith and good intention, and that of this it was the province of a jury to judge, in view of the nature of the charges made and the reasons which existed for making them."

At the conclusion of the arguments the court was cleared and Judge Rhode held a lengthy consultation with the assessors. The court will render a decision today.

State's Exhibit "D."

The "Miau" case.—Editor Valdez of Miau has been found guilty of libel in that he published a certain article detrimental to the character of Commissioner Pardo de Tavera. From the trial
56 it would seem as though the article was presupposed to be libelous, and that all that remained to be done was for the prosecution to prove the fact that Valdez was the editor of the paper at the time the article in question appeared. Under the Spanish law which governed at the time the article was published there is not much doubt but that Valdez was guilty, but under American law, there is considerable doubt as to whether or not he could have been proven guilty. Under the new libel law now in force, it is very possible that Valdez would have been acquitted.

In the first place the defense claims and has always claimed that the allegations against the character of Señor Tavera were true, and published, not from personal motives, but with the idea of benefit-

fing the public by showing up the man in his true colors. If this claim of the defense is true, and they have been given no opportunity to prove it, nor has the prosecution evinced any intention of denying it or of attempting to prove its falsity, the publications in question certainly would not constitute libel, but on the contrary would show public spirit, in an effort to secure clean public servants, on the part of "Miau" and its editor.

For these reasons and for the subservance of fairness and justice, there is a movement on foot among the newspapers of Manila to start a subscription for the payment of the fine which Valdez has been sentenced to pay, and by so doing show that it is not the sentiment of either the newspapers of Manila or of their clientele to permit a man—and that man a foreigner dependent upon
57 our laws and Government—to suffer for an act which was in thorough accordance with Americanism, and which would constitute no offense under American law—always taking into consideration the fact that neither the civil commission nor the native members against whom the allegations were made, have attempted to disprove the statements or to vindicate the good names of the persons attacked.

There is absolutely no feeling in the matter on the part of Freedom beyond that stated above which appears to be in perfect fairness and justice. However we are of the opinion that for the good name of the commissioners attacked, and for the good name of our government in these islands, an investigation should be made of the charges contained in the publication of Valdez, and the truth arrived at. As stated in legal authorities, the personal character of a public servant may not have anything to do with his office, on the theory that a bad man may perform good deeds, and a thief can be honest in some cases, still the public is interested in the personal characters of its servants, and has a perfect right to be. This is most commendable and results as a rule in clean government. Again if the native commissioners have been wronged by the publication of the charges in question, they have not been cleared of the stigma by the conviction of Señor Valdez. The public feeling that the charges were true still remains, and it is due both to the public and to these gentlemen that they be given an opportunity to vindicate
58 themselves if innocent, or that the facts be known if the charges are true. This, we believe, is the sentiment of nearly all Americans who have taken any interest in the matter.

That thereafter and on the 25th day of August, 1902, said defendants were found guilty by the Honorable Byron S. Ambler, said presiding judge of part III of the court of first instance of the city of Manila, of the offense charged against them, and said defendants were thereupon sentenced by said court to each be confined in Bilibid prison at hard labor for a period of six months, and to each pay a fine of one thousand dollars, United States currency, and that thereupon judgment was duly entered in conformity with said de-

cision, and that thereafter said defendants in due legal course perfected their appeal to the supreme court of the Philippine islands.

That thereafter and on the 7th day of January, 1903, said cause was duly remitted by the clerk of said court of first instance to the supreme court of the Philippine islands, and was, on said day, duly filed and entered as a pending cause in said supreme court of the Philippine islands.

That thereupon and thereafter in the said supreme court of the Philippine islands said United States, plaintiff and appellee, was represented by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands, and the said defendants were represented in the said court by Mr. Frederick Garfield Waite as their
59 attorney, and after due proceedings had and presentation of printed briefs and oral argument of counsel in the said cause, said cause was, on the first day of April, 1903, finally heard by said supreme court of the Philippine islands, and thereafter, on the 18th day of May, 1903, the following decision was rendered by the majority of the judges of the said supreme court in the said cause, as follows:

UNITED STATES OF AMERICA:

Supreme Court of the Philippines.

THE UNITED STATES, Appellee,
vs.
FRED L. DORR & EDWARD F. O'BRIEN, Appellants. } Docket No. 1049.

Decision.

On May 23, 1902, a complaint was filed in the court of first instance of the city of Manila against Fred L. Dorr and Edward F. O'Brien, charging them with the publication of a false and malicious libel against Señor Benito Legarda, one of the United States Philippine Commissioners, by placing certain headlines or caption above an article published in the "Manila Freedom," a newspaper in the city of Manila, of which the defendant Fred L. Dorr was the proprietor and the defendant Edward F. O'Brien was the editor.

The following are the headlines or caption upon which the prosecution is based:

"Traitor, seducer and perjurer. Sensational allegations
60 against Commissioner Legarda. Made of record and read in English. Spanish reading waived. Wife would have killed him. Legarda pale and nervous."

The article over and above which the headlines were placed was a report of certain judicial proceedings had in the court of first

instance of the city of Manila in the criminal case of The United States *vs.* Valdez for the offense of libel, and the report was a copy taken from a document prepared by the attorney for Valdez, in which the offer was made, as a defense, to prove the truth of the material allegations contained in and which were the basis of the complaint against Valdez. The facts offered to be proven were published in the "Miau," a newspaper of which Valdez was editor, and related to Señor Legarda, the prosecuting witness in the Valdez case as well as in this case.

At that time, under the libel law the truth of the libelous matter was inadmissible as evidence. The judge of the court of first instance excluded the proof tendered in the document, but permitted it to be filed in the case, and the copy was taken from it by one Vogel, the city reporter of the Manila Freedom. The report was handed by the reporter to the defendant O'Brien, the editor of the paper, and the headlines were written by O'Brien, and the report with the headlines thus prepared was published in the Manila Freedom of date April 16, 1902.

The report seems to have been regarded by the prosecuting attorney as privileged matter under section 7 of the libel
61 act, and, as before stated, the prosecution is based upon the matter contained in the headlines.

On August 25th, 1902, the defendants were tried and found guilty of the offense charged in the complaint, and each was sentenced to six months' imprisonment at hard labor and a fine of $1,000, U. S. currency. From this judgment the defendants have appealed to this court.

A demurrer was filed to the complaint, based upon the ground that the facts charged in the complaint did not constitute a public offense. This demurrer was overruled by the trial court and an exception to the ruling taken by the defendants.

During the course of the proceedings a motion was made by the defendants asking that they be granted a trial by jury, as provided for in article 3, section 2, of the Constitution of the United States, and under the sixth amendment to the Constitution, which motion was denied by the court and an exception was also taken to this ruling.

Before entering into a discussion of the case upon its merits it will be necessary to consider the questions of a preliminary nature which have been raised in the assignment of errors and brief of counsel for the appellants.

The questions submitted may be embraced within the following propositions.

(1.) That by the treaty of peace between the United States and Spain, ratified on the 11th day of April, 1899, the Philippine
62 islands became a part of the United States.

(2.) And being a part thereof, they are subject to the provisions of section 2, article 3, of the Constitution, and to the pro-

visions contained in the sixth amendment to the Constitution, by which in all criminal cases a trial by jury is guaranteed.

(3.) That Congress can exercise no power over the person or property of a citizen beyond what the Constitution confers, nor deny any right guaranteed to them by the Constitution.

Stated in its simple form, the proposition made is that the provisions of the Constitution of the United States relating to jury trials are in force in the Philippine islands.

The determination of this question involves the consideration of the political status of these islands, the power of Congress under the Constitution, and the nature of the constitutional provisions relating to jury trials.

The political status of the Philippine islands has been defined to a large extent by the decision of the Supreme Court of the United States in the case of Downes *vs.* Bidwell, 182 U. S. Rep., 244, in which case the status of Puerto Rico was directly involved.

The question in that case was whether merchandise brought into the port of New York from Puerto Rico after the ratification of the treaty of peace with Spain and since the passage of the Foraker act is exempt from duty, and involved the question whether the revenue clauses of the Constitution extend of their own force to
63 the newly acquired territories from Spain, and whether the act is in contravention of the uniformity clause of the Constitution.

The conclusion was reached that the act in question was not unconstitutional. In the consideration of the case an exhaustive review was made of the powers of Congress to govern the territories belonging to the United States under the power to acquire territory by treaty and the incidental right to govern such territory, and under the clause of section 3, article 4 of the Constitution, which vests Congress with the power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States. This review was made in the light of the opinion of contemporaries, the practical construction placed upon the Constitution by Congress and the decisions of the Supreme Court of the United States upon questions arising thereunder. Distinctions were found to exist in the application of the Constitution depending upon the relation which was borne to the National Government whether by a State or by the territories which belonged to certain States at the time of the adoption of the Constitution, and which were situated within the acknowledged limits of the United States, also such territory as might be acquired by the establishment of a disputed line; or by those which were acquired by cession from foreign powers and to which the Constitution was extended by the treaty under which they were ceded, sanctioned by Congress, or to which the Constitution was expressly extended by con-
64 gressional act; or by those territories acquired from a foreign power by treaty, which have not been incorporated as a part

of the United States nor to which has been extended the Constitution by act of Congress.

The following conclusions are deducible from the decision in that case:

1. That Puerto Rico, (to which the Philippines is equally situated,) did not by the act of cession from Spain to the United States become incorporated in the United States as a part of it, but became territory pertaining to and belonging to the United States.

2. That as to such territory Congress may establish a temporary government, and in so doing it is not subject to all the restrictions of the Constitution.

3. That the determination of what these restrictions are and what particular provisions of the Constitution are applicable to such tertories involves an inquiry into the situation of the territory and its relations to the United States.

4. That the uniformity provided for in the revenue clause of the Constitution is not one of those restrictions upon Congress in its government of the Territory of Puerto Rico.

What is the character of these restrictions and how are they to be ascertained and determined? And to what extent is the Constitution in force and effect in these islands?

Both Mr. Justice Brown, in delivering the majority opinion,
65 and Mr. Justice White, in delivering the concurring opinion, refer to these constitutional restrictions.

In formulating certain propositions as his conclusions, Justice White uses the following language:

"Whilst, therefore, there is no express or implied limitation on Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not suggest that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

He also says: "Undoubtedly, there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts. In the nature of things, limitations of this character cannot be under any circumstances transcended, because of the complete absence of power.

"The distinction which exists between the two characters
66 of restrictions, those which regulate a granted power and those which withdraw all authority on a particular subject,

has in effect been always conceded, even by those who most strenuously insisted on the erroneous principle that the Constitution did not apply to Congress in legislating for the territories, and was not operative in such districts of country."

Mr. Justice Brown in this connection quotes the following language used by Mr. Justice Bradley in the case of The Mormon Church *v.* The United States, 136 U. S.:

"'Doubtless Congress, in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers, than by any express and direct application of its provisions.'"

Again he says: "There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests."

The case of The American Ins. Co. *v.* Canter, 1 Pet., 511, is a very interesting and instructive case which well illustrates the difference in the application of constitutional provisions to territories which are a part and within the United States, and to those acquired from a foreign power by cession which have not been incorporated
67 into the United States, nor have had by act of Congress the Constitution extended to them.

Florida was ceded by Spain to the United States, as was also the Philippines.

The status of the Philippines at the present time is very similar to that of Florida at the date of the act passed by the legislative council of Florida, the constitutionality of which was considered in the case of American Ins. Co. *v.* Canter. The statement of the case and the decision is taken from the opinion of Justice Brown in the case of Downes *v.* Bidwell, and is as follows:

This case originated in the district court of South Carolina "for the possession of 356 bales of cotton, which had been wrecked on the coast of Florida, abandoned to the insurance companies, and subsequently brought to Charleston. Canter claimed the cotton as *bona fide* purchaser at a marshal's sale at Key West, by virtue of a decree of a territorial court consisting of a notary and five jurors, proceeding under an act of the governor and legislative council of Florida. The case turned upon the question whether the sale by that court was effectual to divest the interest of the underwriters. The district judge pronounced the proceedings a nullity, and rendered a decree from which both parties appealed to the circuit court. The circuit court reversed the decree of the district court upon the ground that the proceedings of the court at Key West were legal, and transferred the property to Canter, the alleged purchaser.

68 "The opinion of the circuit court was delivered by Mr. Justice Johnson of the supreme court, and is published in full in a note in Peters' Reports. It was argued that the Constitu-

tion vested the admiralty jurisdiction exclusively in the General Government; that the legislature of Florida had exercised an illegal power in organizing this court, and that its decrees were void. On the other hand, it was insisted that this was a court of separate and distinct jurisdiction from the courts of the United States, and as such its acts were not to be reviewed in a foreign tribunal, such as was the court of South Carolina; 'that the district of Florida was not part of the United States, but only an acquisition or dependency, and as such the Constitution *per se* had no binding effect in or over it.' 'It becomes,' says the court, 'indispensable to the solution of these difficulties, that we should conceive a just idea of the relation in which Florida stands to the United States. * * * And, first, it is obvious that there is a material distinction between the territory now under consideration, and that which is acquired from the aborigines (whether by purchase or conquest) *within* the acknowledged limits of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question, that the sovereignty of the State or territory within which it lies, and of the United States, immediately attach-, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty. The question now to be considered, relates
69 to territories previously subject to the acknowledged jurisdiction of another sovereign, such as was Florida to the crown of Spain. And on this subject, we have the most explicit proof, that the understanding of our public functionaries is, that the General Government and laws of the United States do not extend to such territory by the mere act of cession. For, in the act of Congress of March 30, 1822, section nine, we have an enumeration of the acts of Congress, which are to be held in force in the territory; and in the tenth section an enumeration, in the nature of a bill of rights, of privileges and immunities, which could not be denied to the inhabitants of the territory, if they came under the Constitution by the mere act of cession. * * * These States, this territory, and future *States* to be admitted into the Union are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.' He further held that the right of acquiring territory was altogether incidental to the treaty-making power; that their government was left to Congress; that the territory of Florida did 'not stand in the relation of a State to the United States;' that the acts establishing a territorial government were the constitution of Florida; that while, under these acts, the territorial legislature could enact nothing inconsistent with what Congress had made inherent and permanent in the territorial government, it had not done so in organizing the court at Key West."

Justice Brown further cites from the opinion of Chief Justice Marshall in this case, in which the latter held "that the
70 judicial clause of the Constitution, above quoted, did not apply to Florida; that the judges of the superior courts of

Florida held their office for four years; that 'these courts are not constitutional courts in which the judicial power conferred by the Constitution on the General Government, can be deposited;' that 'they are legislative courts, created in virtue of the general right of sovereignty which exists in the Government,' or in virtue of the territorial clause of the Constitution; that the jurisdiction with which they are invested is not a part of judicial power of the Constitution, but is conferred by Congress, in the exercise of those general powers which that body possesses over the territories of the United States; and that in legislating for them Congress exercises the combined powers of the general and of a State government. The act of the territorial legislature, creating the court in question, was held not to be 'inconsistent with the laws and Constitution of the United States,' and the decree of the circuit court was affirmed."

Remarking upon this case, Justice Brown says:

"As the only judicial power vested in Congress is to create courts whose judges shall hold their offices during good behavior, it necessarily follows that, if Congress authorizes the creation of courts and the appointment of judges for a limited time, it must act independently of the Constitution, and upon territory which is not part of the United States within the meaning of the Constitution."

The act of Congress of July 1, 1902, entitled, "An act tem-
71 porarily to provide for the administration of the civil government of the Philippine islands, and for other purposes," in section 5 extends to the Philippine islands nearly all of the provisions of the Constitution known as the bill of rights. But there was excepted from it the provisions of the Constitution relating to jury trials contained in sec. 2, article 3, and in the sixth amendment.

It becomes necessary for us to determine whether these provisions of the Constitution of the United States relating to trials by jury are in force in the Philippine islands.

It is difficult to determine from the general statements contained in these decisions what are "those fundamental limitations in favor of personal sights which are formulated in the Constitution and its amendments and which exist by inference."

It seems fairly deducible from all that has been said upon this subject that such provisions are negative in character rather than of a direct positive or affirmative nature, denying to Congress the power to pass laws in contravention with such principles of the Constitution.

If this is their nature and this be the true distinction, it cannot be said that either Congress or the Philippine Commission have passed any laws which would come within the inhibition of the Constitution, or which tend to impair the right to trial by jury in these islands.

All that can be said is, that in extending the various provisions
of the bill of rights here Congress has failed to extend those
72 provisions guaranteeing the right to trial by jury.

We will now turn to the consideration of the question as to

whether a violation of the right to a jury trial falls within the inhibition arising from the existence of those fundamental limitations in favor of personal rights mentioned in the decisions.

There are a number of cases cited in Downes *v.* Bidwell establishing the right to trial by jury in Territories of the United States, but these decisions have all arisen in cases relating to Territories which were a part of the United States and had been incorporated as a part thereof and to which Congress had expressly extended the Constitution.

In Webster *v.* Reid, 11 How., 437, it was held that the law of the Territory of Iowa, which prohibited the trial by jury of certain actions at law, founded on contract to recover payment for services, was void; but, as it is said, this case is of little value as bearing upon the question of the extension of the Constitution to that Territory, inasmuch as the organic law of the Territory of Iowa enacted by Congress, by its express provision extended to Iowa the laws of the United States, including the ordinance of 1787, (which provided expressly for jury trials,) so far as they were applicable; and the case was put upon this ground.

In Callan *v.* Wilson, 127 U. S., 540, the defendant had been convicted, without jury trial, in the District of Columbia; but
73 the District of Columbia was not only within and a part of the United States, but had formed a part of the original States of Virginia and Maryland.

In the case of Springville *v.* Thomas, 166 U. S., 707, it was held that a verdict returned by less than the whole number of jurors was invalid, because in contravention of the seventh amendment to the Constitution and the act of Congress of April 7, 1874, which provide that no party shall be deprived of the right of trial by jury in cases cognizable at common law. This is, as stated by Mr. Justice Brown, "obviously true with respect to Utah, since the organic act of that Territory had expressly extended to it the Constitution and laws of the United States."

The other decisions cited by counsel for the appellants can all be traced to the same principle; that is, that where Congress has extended the laws and the Constitution to the Territories then Congress would be inhibited by the Constitution from enacting a law depriving persons living in such Territories from the right to trial by jury.

The only case which we have been able to discover arising under an act of Congress, and which deprived a party of the right to a trial by jury at a place where the Constitution had not been extended by express provision, is the case of Ross *v.* McIntyre, 140 U. S. Rep., 453. This was a case in which the American consular tribunal in Japan, created by act of Congress under treaty with the government of Japan and vested with jurisdiction, to be exercised and enforced in accordance with the laws of the United States, to try
74 Americans had, in the exercise of this jurisdiction, convicted the defendant of the crime of murder, and he was sentenced by that court to the penalty of death.

It was held that "the guarantees it [the Constitution] affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents and temporary sojourners abroad."

It seems from this decision that the powers of Congress to enact a law which would deprive a person of the right to a trial by jury is expressly recognized, and that such legislation does not come within the fundamental limitations in favor of personal rights, for this act of Congress which operated upon citizens of the United States abroad is recognized as a valid act of Congress.

The act is saved from the constitutional inhibition by reason that in such country the Constitution of the United States does not extend, and is not in force there, but the decision in this case nevertheless establishes the doctrine that there is not upon Congress an absolute and total inhibition under any and all circumstances to enact a law in which a person is deprived of the right to a trial by jury.

It may be further observed that if it should be held that the constitutional provision guaranteeing the right to trial by jury has been introduced here by the simple act of cession there is no
75 law in existence to give such provision effect.

Trial by jury was unknown to the law in force in these islands prior to the date of cession, nor has the Philippine Commission passed any law which would give it effect. Such provisions of a constitution as those relating to trial by jury can hardly be regarded as self-executing. It is necessary that there should be some legislation carrying them into effect, such as laws prescribing the qualifications of persons for jury duty, for the organization of juries and provisions of a like character.

Suppose the Constitution has been extended here by force of the cession of territory and that it should be held that there could be no legal conviction for crime in the Philippines on account of the absence of the law prescribing the qualification of jurors or for the organization of juries, and Congress, in the exercise of its sound judgment, after a careful examination of the conditions prevailing in such territory and in the exercise of its undoubted right to govern the territory should reach the conclusion that an efficient territorial government could not be conducted in which convictions for crime are dependent upon the verdict of juries, by reason of the hostility of the inhabitants of such country to the constituted authorities, or the lack of the qualification of the people of the country or an extensive portion of it to perform jury service, and should refuse to enact any law for jury trials, the criminal laws in such event
76 must remain unenforced and a state of anarchy would be the result. In such case the question assumes very much the nature of a political question, and the judicial department might

well hesitate to interfere indirectly with Congress in the exercise of its judgment, and in the exercise of its broad discretion in the government of a territory so situated.

It is contended, also, by counsel for the defendants, that Congress could not lawfully authorize the Philippine Commission to enact the libel law passed by it on October 24, 1901, and under which the defendants have been convicted. The objection to the law is based upon the theory of the division of the Federal Government into three branches: executive, legislative and judicial; and that the powers of legislation vested in Congress to make laws cannot be delegated by that department to the judgment, wisdom or patriotism of any other body or authority.

While the authorities cited in support of the general proposition maintain the doctrine, there are well known exceptions to the general rule not referred to in these decisions, for the reason that the decision of the case did not require their consideration. A well known exception is that of municipal corporations, upon which the powers of legislation are commonly bestowed.

The case in question forms an exception to this general rule equally well established. Congress, in the exercise of its power to make rules and regulations for the government of the territories, has often delegated the power of legislation to the territorial governments. The case of American Ins. Co. *v.* Canter, 1 Pet., 511, before cited,
originated under an act of the governor and legislative
77 council of Florida organizing a court and vesting in it admiralty jurisdiction, and in which the jurisdiction of the court was sustained by the Supreme Court of the United States.

Speaking of the power of Congress in creating territorial governments, it is said in the case of De Lima *v.* Bidwell, 182 U. S. Rep., that "the power to establish territorial government has been too long exercised by Congress and acquiesced in by the Supreme Court to be deemed an unsettled question."

We reach the conclusion in this case:

1. That while the Philippine islands constitute territory which has been acquired by, and belongs to, the United States, there is a difference between such territory and the Territories which are a part of the United States with reference to the Constitution of the United States.

2. That the Constitution was not extended here by the terms of the treaty of Paris, under which the Philippine islands were acquired from Spain. By the treaty the status of the ceded territory was to be determined by Congress.

3. That the mere act of cession of the Philippines to the United States did not extend the Constitution here except such parts as fall within the general principles of fundamental limitations in favor of personal rights formulated in the Constitution and its amendments, and which exist rather by inference and the general spirit of the
Constitution, and except those express provisions of the
78 Constitution which prohibit Congress from passing laws in their contravention under any circumstances; that the pro-

visions contained in the Constitution relating to jury trials do not fall within either of these exceptions, and, consequently, the right to trial by jury has not been extended here by the mere act of the cession of the territory.

4. That Congress has passed no law extending here the provision of the Constitution relating to jury trials, nor were any laws in existence in the Philippine islands at the date of their cession for trials by jury, and consequently there is no law in the Philippine islands entitling the defendants in this case to such trial; that the court of first instance committed no error in overruling their application for a trial by jury.

We also reach the conclusion that:

The Philippine Commission is a body expressly recognized and sanctioned by act of Congress, having the power to pass laws, and has the power to pass the libel law under which the defendants were convicted.

We will now pass to the third assignment of error, which is, that the headlines or caption of the article charged to be libelous were legitimate deductions from a previous report of a public judicial proceeding and were insufficient to constitute the offense of libel.

The testimony shows that the defendant Fred L. Dorr was the proprietor and that the defendant Edward F. O'Brien was the editor of the "Manila Freedom;" that the article upon which the complaint is founded was published in its issue of that paper on the 16th of April, 1902; that the privileged statements or report
79 of the judicial proceedings, the headlines of which are the basis of the prosecution, arose on the trial of the case of The United States *v.* Valdez, in the court of first instance in the city of Manila, in which case Valdez was charged with the offense of libel, the complaining witness in that case being Señor Legarda, who was also the complaining witness in this case; that counsel for the defendant Valdez prepared a written statement of certain facts and offered to prove the truth of these statements if permitted by the court.

A copy of this statement was made by the reporter of the "Manila Freedom"—one Vogel—which, having been presented to the defendant O'Brien, the editor, he prepared the headlines or caption set forth in the complaint.

The attorney for the defendants under his assignment of errors makes the proposition that the headlines or caption was a legitimate deduction from the privileged report of the judicial proceedings, and as such was itself a privileged publication. This proposition is succinctly made and is easily understood; no material facts are in dispute; our law of libel is contained in the few sections in which the law upon this subject is concisely and clearly stated, and renders it unnecessary to refer to text books or decisions of the courts of other jurisdictions. Thus the labors of the court have been simplified in the determination of the case.

Section 1 of act No. 277, Philippine Commission, gives the following definition of libel:

"A libel is a malicious defamation, expressed either in
80 writing, printing, or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead, or to impeach the honesty, virtue or reputation, or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt or ridicule."

Did the matter contained in these headlines or caption have a tendency to impeach the honesty, virtue and reputation of the injured party? We need not stop to discuss this question.

Was it a *malicious* defamation? This appears equally plain, for section 3 is as follows:

"An injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."

No attempt has been made by the defendants to show a justifiable motive and the established presumption of law that the publication was malicious must prevail. Nor has there been any attempt made to show the truth of the matter contained in the headlines.

But it is attempted to bring the headlines or caption within the exception of privileged matter.

Section 7 of the act defines this character of privileged matter as follows:

"No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech,
argument or debate in the course of the same, except upon
81 proof of malice in making such report, which shall not be implied from the mere fact of publication."

Section 8 reads as follows:

"Libelous remarks or comments connected with matter privileged by the last section, receive no privilege by reason of being so connected."

It has been seen that the matter is libelous; that it was a malicious publication as defined by law. The only question that remains to be considered is, were these headlines or caption "remarks" or "comments" on the privileged matter.

The word "comment" is defined by Webster as a "remark, observation or criticism; gossip, discourse, talk; *a note or observation intended to explain*, illustrate or criticise *the meaning of a writing*, book, etc. Explanation, annotation, exposition."

The word "remark" is defined by him as "an expression in speech or writing of something remarked or noticed. *The mention of that which is worthy of attention or notice.* A casual observation, comment or statement."

The headlines or caption comes within the definition of "remarks" as given by Webster, in that it is "the mention of that which is worthy of attention or notice," and they also fall within the defini-

tion of the word "comments" defined as "a note or observation intended to explain."

The defendants' counsel denominates the character of the
82 headlines or caption as a "legitimate deduction from the privileged report."

The word "deduction" is defined by Webster as "that which is deduced, or drawn from premises by a process of reason; inference; acquisition."

It seems from these definitions that the word "deduction" conveys about the same meaning as the words "comment" and "remark;" at least it would be as objectionable to make injurious deductions as to make injurious comments or remarks.

To say that the headlines or caption is not a remark or comment but an "epitome" or "index" of what is contained in the privileged article is simply a play upon words, and it is useless to follow this line of argument further.

The intention of the statute, as shown in articles 7 and 8, is, that the privileged matter should be a fair and true report, and must stand alone as such. If headlines or captions are used the matter contained in them must not be remarks or comments of a libelous nature.

If by any process additional significance is added, either by display letters or by the arrangement of catch-words, under whatever name they may be designated, it comes within the denunciation of the statute.

That the headlines were not a part of the report prepared by Vogel, the reporter who was present in the court and who made a copy of the report, is shown in the testimony.

The defendant O'Brien, who, so far as the testimony shows,
83 knew nothing about the matters contained in the report except that acquired by the reading of it after it was delivered to him, made the headlines or caption.

It is said that it is the common practice in the United States to make such headlines in display letters to render the necessary assistance to the reader in determining whether he cares to read the article.

It is immaterial what the real intention of those who write such headlines may be; if such caption and headlines are libelous the writer must bear the consequences.

The law declares the motive of the writer in the absence of proof of justifiable motive, and the truth of the matter, to be malicious.

The decisions of some of the courts of the United States have held that an index of words contained in the privileged matter, when fairly and truly made, will partake of the nature of the article indexed, but, as we have shown, our law does not permit this. Nor is it possible to reach the conclusion that the words contained in the headlines are a fair index. No idea can be gathered from these headlines of the real nature of what is contained in the published article.

The privileged report was a written statement prepared by the attorney in the Valdez case, in which an offer was made to prove the truth of certain statements regarded as material in the defense of the case, and which was by the court excluded. This was the general nature of the matter contained in the report. Can any one, by reading the headlines or caption, form any conception as
84 to the real nature of the document to which the headlines have been prefixed?

It is also said that the headlines in this case are not worse than the matter contained in the report. This may be admitted as true, but in the eyes of the law there is a distinction. The injurious *matter contained in the report is regarded by the law as protected* by a privilege which should be extended to the report of judicial proceedings, but here the privilege ends.

It is unnecessary to inquire why this distinction should be made. It is sufficient that the law so makes it.

It is stated that there is not a word contained in the headlines or caption which is not found in the privileged report. We have attempted to show that this is immaterial. But this statement is in fact incorrect. The sentences: "Sensational allegations against Commissioner Legarda, made of record and read in English; Spanish reading waived; wife would have killed him; Legarda pale and nervous," are not found in the report. Nor can the sentence "Legarda pale and nervous" even be deduced from anything contained in the report, nor does it appear from the testimony to have been in fact true. When the statement in writing was offered and read before the court, according to the testimony in the case, Señor Legarda was not at that time present in court.

We will notice briefly the character of the caption and headlines, the effect of which can well be imagined.

The copy of the Manila Freedom containing the article is
85 attached to the record. An examination of it shows that the words "traitor, seducer and perjurer" were printed in large display letters, and were of a size sufficient in the use of these words to cover a space equal to that of three columns across the paper. They were placed at the top of the first page of the paper. The other words were in smaller type, but much larger than the ordinary type. It is hard to conceive language stronger than that contained in the three words "traitor, seducer and perjurer."

No more effectual means could be adopted to destroy the good name and fame of a person. More significant words cannot be found in the English language to impeach the honesty, reputation and virtue. By skilful selection the sting of the entire document has been placed in the caption and headlines in such a manner that in a literal sense "he who runs may read."

We conclude that the publication of the caption and headlines in the Manila Freedom upon which the information is based constituted the offense of the libel; that the judgment is sustained by the evidence; that the defendants Fred L. Dorr and Edward F.

O'Brien are guilty of the offense charged in the information; that no error was committed in the trial of the case prejudicial to the rights of the defendants, and that the judgment of the court of first instance should be affirmed, with costs against the defendants.

It is so ordered and adjudged.

JOSEPH F. COOPER.

We concur:

C. S. ARELLANO.
FLORENTINO TORRES.
VICTORINO MAPA.

86 That thereafter and on the said 18th day of May, 1903, a dissenting opinion was filed in the said cause by two of the judges of said supreme court as follows, to wit:

Dissenting Opinion.

The case presents two questions: (1) were the headlines privileged, and (2) if they were, was there express malice in publishing them?

1. The important part of the article in question and the only part which contained any libelous matter was the offer to prove contained in it. This offer was actually made a part of the record of the case on trial in the court of first instance. Under article 7 of the libel law the defendants had the right to publish it if they did so without malice. The Government recognized this right when it limited the charge in the complaint to the headlines of the article, and it is not and cannot be claimed that the defendants are guilty of libel for publishing the article itself.

Nothing could be worse or more libelous than the statements contained in this offer. I do not wish to give them currency by copying them here, but it is necessary to say that it was distinctly charged in this offer in so many words that the complaining witness in the case "seduced" a girl living in his house. It was also distinctly charged therein that he had added to his other crimes those of treason and perjury. For the publication of these most grave

87 and unfounded charges the defendants are not prosecuted.

They are, however, prosecuted for placing over the article certain headlines.

That headlines to a privileged article may be used can not be doubted. The public must be able to get some idea of what a newspaper article contains without reading it entirely through. And it is not claimed that the defendants had not a right to put a proper heading to this report. The question is, Was the one actually used proper?

If the heading is a fair index and nothing more of the article it is as much privileged as the article itself. If it expressses the opinion of the editor on the statements in the article it is not

privileged as to such expressions. Such expressions of opinion are called in our law comments and remarks. The rule is well illustrated in this case. The words "Spanish reading waived" is a mere statement of what the article contains. It expresses no opinion of the editor upon any part of it. On the contrary, the word "sensational" in connection with the word "allegations" is a comment or remark and is not privileged. It says that in the opinion of the editor the allegations made in the offer are sensational. It is not an index of any statement of fact made in the article, but is an expression of opinion upon such facts.

The headline "Legarda pale and nervous" can perhaps be considered as an expression of opinion, although in this respect there is a statement of fact to this effect. But this is unimportant,
88 for these words, even if not privileged, are not libelous. Neither is the word "sensational" libelous.

It is claimed that the words "traitor, seducer, perjurer" are not an index of the article, but are an expression of the opinion of the editor that the complaining witness was a traitor, seducer, and perjurer.

In order to determine this question it is necessary to consider the whole of the headline and to consider it with reference to the article itself. The mechanical necessities of newspaper composition generally forbid the employment of complete grammatical sentences in headlines. They must of necessity be elliptical. The reader does not expect to find the whole thought contained in the first two or three isolated words. It is necessary to look at the whole of the headlines to ascertain this.

The case at bar illustrates this proposition. The first line consisting of these three words of itself means nothing. The words are not spoken of any person. In order to find out to whom they refer it is necessary to go to the line below, in which, while it is learned that they refer to Señor Legarda, it is also seen at the same time that they were *allegations* made against him.

The necessity of reading the whole of the headlines in order to get the meaning of the isolated words is illustrated by the other half of this same page. On the first line are the words "Situation in Hongkong." On the next line are the words "Health authorities, fighting the Asiatic cholera epidemic." The first line does
89 not show what feature of the situation in Hongkong is treated of in the article. The second line does not show where the health authorities are taking action. It is only by reading them together that one learns what the article is about.

Fairly construed, the headlines in question say that sensational allegations of being a traitor, seducer, and perjurer have been made against Commissioner Legarda. A person knowing nothing about the case or the parties to it, reading the whole of the headlines, could get no other idea from it. Omitting the word "sensational" which has already been considered, this statement is a fair index of the offer to prove which, as has been said before, was the principal

part of the article and the only libelous part. That these crimes were plainly and distinctly and in those very words alleged against him is shown by a reading of the offer to prove. It is difficult to see how anyone could make a fair index of that offer without using those words. That was all there was of it.

The result upon this branch of the case is that the headlines are nothing more than a fair index of the article and are therefore privileged with the exception of the words "sensational" and "Legarda pale and nervous," which are not libelous.

2. What has been said already leaves out of consideration the question of malice.

By the express terms of article 7, if the defendants pub-
90 lished this judicial record with express malice, they are guilty.

The Government claims that there was express malice. It is not apparent why with such a claim the Government did not prosecute the defendants for publishing the article itself, for, as we have said, it is infinitely worse in its details than the headlines.

The article with the headlines being privileged, the burden of proving express malice was on the Government.

It relied upon two kinds of evidence. It claimed that the size of type and the arrangement of the headlines proved malice. There would be some force to this claim were it not for the fact that the other headlines on the same page, to which we have referred, are in the same size of type and the arrangement of the subheads is identical with the one in question. Each one takes up one-half of the page. Any presumption of malice in the use of large type for the words "traitor," etc., is to my mind conclusively rebutted by the use of the same size in printing the words "Situation in Hongkong."

An examination of other numbers of this paper offered in evidence during the trial shows that this size of type was in frequent use for headlines of the most indifferent character.

The only other evidence introduced consisted of articles in other numbers of the same paper relating to the same matter. These stated the gravity of the charges made; the condition of the law in regard to the presentation of the truth as a defense, and urged
91 that an investigation be had for the purpose of showing whether the charges were true or not. There was no other proof of express malice.

It was proved at the trial that neither of the defendants knew Commissioner Legarda even by sight. There was no evidence that they had ever had dealings of any kind with him.

The newspaper articles do not show any express malice and any inference of that kind which could be drawn from them is, to my mind, overcome by the proof that the defendants did not know the person whom they are charged with having maliciously libeled.

In conclusion it may be said that while the defendants are not guilty, the person who made this offer in court is, for the reasons stated in my concurring opinion in the case of the United States *vs.*

Lerma, and if prosecuted for this libel could, as far as appears from the record in this case, have been convicted.

The judgment should be reversed and the defendants acquitted.

CHARLES A. WILLARD,
Associate Justice.

I concur:

FLETCHER LADD.

That to the said decision and judgment of the said supreme court the said defendants, through their counsel, duly excepted, and that thereafter and on the first day of June, 1903, said defendants,
92 by said Frederick Garfield Waite, their counsel, presented their said petition in error to the honorable the Supreme Court of the United States in the said cause, together with their said assignments of error, as follows, to-wit:

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee, vs. FRED L. DORR and EDWARD F. O'BRIEN, Defendants and Appellants.	Libel.	Cause No. 1049.

Fred L. Dorr and Edward F. O'Brien, defendants and appellants in the above entitled cause, feeling themselves aggrieved by the decision of the court made on the 16th day of May, 1903, and the judgment entered on the 18th day of May, 1903, come now by Frederick Garfield Waite, Esquire, their attorney, and petition said court for an order allowing said Fred L. Dorr and said Edward F. O'Brien to prosecute a writ of error in the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which defendants shall give pending said writ of error; and that, upon the giving of said security, all further proceedings in this court be suspended
93 and stayed, until the determination of said writ of error by said Supreme Court of the United States.

(S'g'd) FREDERICK GARFIELD WAITE,
Attorney for Defendants and Appellants.

Filed in the clerk's office of the supreme court of the Philippines June 1st, 1903, at 11:10 a. m.

(S'g'd) F. C. FISHER, *Clerk.*

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
vs.
FRED L. DORR and EDWARD F. O'BRIEN, Defendants and Appellants.
} Cause Numbered 1049. Libel.

And now come the defendants and appellants by Frederick Garfield Waite, Esquire, their attorney, and assign the following assignment of errors, which they aver occurred upon the hearing of said cause, and upon which they will rely in the prosecution of their writ of error in the above entitled cause:

1. The court erred in affirming the judgment of the court of first instance in said cause, finding said defendants guilty and sentencing them to imprisonment for the period of six months, and the payment of a fine of one thousand dollars each, and costs.

94 2. The court erred in holding that these defendants were not entitled to a trial by an impartial jury, as provided in article III, section 2, and amendment VI of the Constitution of the United States.

3. The court erred in holding that act numbered two hundred and seventy-seven, passed by the United States Philippine Commission, is a valid law, passed by competent legislative authority.

4. The court erred in holding that the facts charged in said complaint constituted a public offense.

5. The court erred in holding that said headlines, or caption, declared upon were not a legitimate deduction from a privileged publication of an exact and truthful account of a public judicial proceeding in a court of record.

Wherefore, the said Fred L. Dorr and Edward F. O'Brien, plaintiffs in error, pray that the judgment of the supreme court of the Philippine islands be reversed and said cause against them dismissed, and that they go hence without day.

(S'g'd) FREDERICK GARFIELD WAITE,
Attorney for Plaintiffs in Error, Defendants in the Lower Court.

Filed in the office of the clerk of the supreme court of the Philippines June 1st, 1903, at 11:10 a. m.

(S'g'd) F. C. FISHER, *Clerk.*

95 That thereupon, and on said first day of June, 1903, a writ of error was duly granted by the Honorable Charles A. Willard, one of the associate judges of the supreme court of the Philippine islands, in said cause, as follows, to wit:

In the Supreme Court of the United States.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.
} Writ of Error.

UNITED STATES OF AMERICA, *Philippine Islands,* } *ss:*

The President of the United States of America to the judges of the supreme court of the Philippine islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the said supreme court of the Philippine islands, before you or some of you, between the *United States of America*, plaintiff and appellee, against *Fred L. Dorr and Edward F. O'Brien*, defendants and appellants, a manifest error hath happened, to the great damage of said Fred L. Dorr and Edward F. O'Brien, as is said and appears by their petition for a writ of error, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that
96 then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 28th day of July next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 29th day of May, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States, the one hundred and twenty-eighth.

(S'g'd) F. C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

The foregoing writ is allowed, and upon the filing in the office of the clerk of this court, by each of said plaintiffs in error, of a bond in the sum of two thousand dollars, ($2,000.00) United States currency, approved by me, it is ordered that said writ of error shall operate as a supersedeas and stay of execution.

Dated: Manila, P. I., June 1st, 1903.

(S'g'd) CHARLES A. WILLARD,
Associate Justice of the Supreme Court of the Philippine Islands.

Filed in the office of the clerk of the supreme court of the
97 Philippines June 1st, 1903, at 11:12 a. m.
(S'g'd) F. C. FISHER, *Clerk.*

That thereupon and on the said first day of June, 1903, due citation was issued in the cause of Fred L. Dorr and Edward F. O'Brien, plaintiffs in error, against The United States, defendants in error, entitled "In the Supreme Court of the United States, to L. R. Wilfley, Esquire, attorney general of the Philippine islands," as follows, to wit:

In the Supreme Court of the United States.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error,
vs.
THE UNITED STATES, Defendant in Error.
} Citation.

UNITED STATES OF AMERICA, *Philippine Islands,* } *ss:*

By the Honorable Charles A. Willard, judge of the supreme court of the Philippine islands.

To L. R. Wilfley, Esquire, attorney general of the Philippine islands, attorney for the United States of America, and to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol in the city
98 of Washington, in the District of Columbia, on the 28th day of July, 1903, pursuant to a writ of error filed in the clerk's office of the supreme court of the Philippine islands, wherein Fred L. Dorr and Edward F. O'Brien are plaintiffs in error, and The United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand, at the city of Manila, in the supreme court of the Philippine islands, above named, this 29th day of May, in the year of our Lord one thousand, nine hundred and three, and of the Independence of the United States, the one hundred and twenty-eighth.

(S'g'd) CHARLES A. WILLARD,
Judge of the Supreme Court of the Philippine Islands, Manila, P. I.

FREDERICK GARFIELD WAITE,
Manila, P. I., Attorneys for Plaintiffs in Error.

That the said citation was duly served.

That thereafter and on the 3d day of June, A. D. 1903, a supersedeas bond was filed by Fred L. Dorr, one of the said defendants in the said cause, as follows, to-wit:

99 UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
vs.
FRED L. DORR and EDWARD F. O'BRIEN, Defendants and Appellants.
} Libel. Cause Number 1049.

Know all men by these presents, that we, Fred L. Dorr, as principal, and Henry M. Jones and George E. Wolf, as sureties, are held and firmly bound unto the United States of America, in the sum of two thousand dollars, lawful money of the United States, to which payment well and truly to be made, we jointly and severally bind ourselves, and our and each of our heirs, executors, administrators, and assigns, firmly by these presents.

Sealed with our seals and dated this 3d day of June, A. D. 1903.

The condition of this obligation is such that whereas, the above named Fred L. Dorr has sued out a writ of error to the Supreme Court of the United States to reverse the judgment in the above entitled cause, heretofore rendered by the supreme court of the Philippine islands. Now, therefore, if the said Fred L. Dorr shall prosecute said writ of error to effect, and answer and surrender himself in conformity with the judgment heretofore rendered by the supreme court of the Philippine islands, in said cause, should
100 the same be affirmed or found without error by the Supreme Court of the United States, or said writ of error dismissed; then, and in that event, this obligation shall be null and void, otherwise to be and remain in full force and virtue.

(S'g'd) FRED L. DORR. [SEAL.]
(S'g'd) GEO. E. WOLF. [SEAL.]
(S'g'd) HENRY M. JONES. [SEAL.]

UNITED STATES OF AMERICA,
Philippine Islands,
} *ss:*

Henry M. Jones and George E. Wolf came before me personally, and being first duly sworn, each for himself deposes and says that he is a resident and freeholder in the Philippine islands, and worth the sum of two thousand dollars, exclusive of debts and liabilities, and over and above his property exempt from execution.

(S'g'd) GEO. E. WOLF.
(S'g'd) HENRY M. JONES.

Subscribed and sworn to before me, this 3d day of June, A. D. 1903.

(S'g'd) J. COURTNEY HIXSON,
[SEAL.] *Notary Public, Whose Commission Expires on January* 1, 1905.

Approved
(S'g'd) CHARLES A. WILLARD,
Associate Justice.

Filed in the clerk's office of the supreme court of the Philippine islands this 9th day of June, 1903, at 10 a. m.
(S'g'd) F. C. FISHER, *Clerk.*

101 That thereafter and on the 10th day of June, A. D. 1903, a supersedeas bond was filed by Edward F. O'Brien, one of the said defendants in the said cause, as follows, to-wit:

UNITED STATES OF AMERICA:

Supreme Court of the Philippine Islands.

THE UNITED STATES, Plaintiff and Appellee,
vs.
FRED L. DORR and EDWARD F. O'BRIEN, Defendants and Appellants. } Libel. Cause Number 1049.

Know all men by these presents, that we, Edward F. O'Brien, as principal, and M. A. Clarke, A. John Francis and I. Beck, as sureties, are held and firmly bound unto the United States of America, in the sum of two thousand dollars, lawful money of the United States, to which payment, well and truly to be made, we jointly and severally bind ourselves, and our and each of our heirs, executors, administrators and assigns firmly by these presents.

Sealed with our seals and dated this 10th day of June, A. D. 1903.

The condition of this obligation is such that, whereas, the above named Edward F. O'Brien has sued out a writ of error to the Supreme Court of the United States, to reverse the judgment in the above entitled cause, heretofore rendered by the supreme court of the Philippine islands. Now, therefore, if the said Edward F.
102 O'Brien shall prosecute said writ of error to effect, and answer and surrender himself in conformity with the judgment heretofore rendered by the supreme court of the Philippine islands, in said cause, should the same be affirmed or found without error by the Supreme Court of the United States; or, said writ of error dismissed; then, and in that event, this obligation shall be null and void, otherwise to be and remain in full force and virtue.

(S'g'd) EDWARD F. O'BRIEN. [SEAL.]
(S'g'd) M. A. CLARKE. [SEAL.]
(S'g'd) A. JOHN FRANCIS. [SEAL.]
(S'g'd) I. BECK. [SEAL.]

UNITED STATES OF AMERICA, }
Philippine Islands, } ss:

M. A. Clarke, A. John Francis and I. Beck came before me personally, and being first duly sworn, each for himself, deposes and says that he is a resident and freeholder in the Philippine islands, and worth the sum of two thousand dollars, exclusive of debts and liabilities, and over and above his property exempt from execution.

(S'g'd) M. A. CLARKE.
(S'g'd) A. JOHN FRANCIS.
(S'g'd) I. BECK.

Subscribed and sworn to before me this 10th day of June, A. D. 1903.

[SEAL.] (S'g'd) PATRICK J. MOORE,
Notary Public.

My commission expires January 1st, 1905.

Approved
(S'g'd) CHARLES A. WILLARD,
Associate Justice.

103 Filed in the clerk's office of the supreme court of the Philippine islands this 11th day of June, 1903, 9:15 a. m.

F. C. FISHER, *Clerk,*
(S'g'd) By J. E. BLANCO, *Deputy.*

104 In the Supreme Court of the United States.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error, }
vs.
THE UNITED STATES, Defendant in Error. }

And now come said plaintiffs in error, represented by their counsel, Frederick Garfield Waite and Charles H. Aldrich, and the said United States, defendant in error, represented by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands, and hereby stipulate and agree that the foregoing is a true and correct record of all the essential proceedings had and of all the evidence taken in the said above entitled cause, both in the court of first instance of the city of Manila, and in the supreme court of the Philippine islands; and that any and all documents originally appearing in said original records in the said above mentioned courts have been duly and correctly translated into the English language, where necessary, and included in this record as a part thereof; and said parties, through their said counsel, further stipulate and agree upon the

foregoing record as being the true and correct record of said
105 cause for presentation to the honorable the Supreme Court of the United States.

FREDERICK GARFIELD WAITE,
Counsel for Plaintiffs in Error.
LEBBEUS R. WILFLEY,
Counsel for Defendant in Error.

106 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error.
} Stipulation.

Whereas the record in the above entitled cause, in both the court of first instance of the city of Manila, and in the supreme court of the Philippine islands, is in the Spanish language, in conformity with law, and is of great length, and,

Whereas, it is essential and necessary that said record should be translated into the English language, or such parts thereof, at least, as may be pertinent and necessary for the full and just presentation of the points at issue in this cause to the honorable Supreme Court of the United States,

Now, therefore, it is hereby stipulated and agreed by and between said Fred L. Dorr and Edward F. O'Brien, plaintiffs in error, by Frederick Garfield Waite, their attorneys, and The United States of America, defendant in error by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands, attorney for said defendant in error, that the time for the translation and compilation of the record in this cause and for the transmission thereof by the clerk of the supreme court of the Philippine islands to the clerk of the Supreme Court of the United States, may be and is hereby extended from this date up to and until the 22nd day of December, A. D., 1903, and that said defendant in error be entitled to have and does have the period of sixty days from and after said 22nd day of December, 1903, and up to and until the 22nd day of February, A. D., 1904, for its entry of appearance in said above entitled cause in conformity with law.

In witness whereof, said above named parties have here-
107 unto set their hands this 1st day of August, A. D., 1903.

FREDERICK GARFIELD WAITE,
Attorney for Plaintiffs in Error.
LEBBEUS R. WILFLEY,
Attorney for Defendant in Error.

108 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Stipulation.

Whereas the record in the above entitled cause, both in the court of first instance of the city of Manila and the supreme court of the Philippine islands, is in the Spanish language and of great length, and,

Whereas, in the judgment of the parties to this cause, only certain portions of said records, are essential and necessary to be transmitted by the clerk of the supreme court of the Philippine islands to the clerk of the Supreme Court of the United States, in order that the said Supreme Court of the United States may justly and truly determine the points raised by the writ of error and assignments of error in this cause, and,

Whereas the above record in this cause, consisting of 105 typewritten pages has been compiled by the clerk of the supreme court of the Philippine islands, in conformity with the agreement of the parties hereto, taking out and excerpting from said record only such parts thereof as are, in the judgment of the parties hereto essential and necessary for the just determination of this cause by the Supreme Court of the United States, and such record above referred to and so compiled and excerpted has, by the clerk of the supreme court of the Philippine islands, been duly translated from the Spanish language into the English language,

Now, therefore, it is hereby stipulated and agreed by and between the parties hereto, Fred L. Dorr and Edward F. O'Brien, plaintiffs in error, by Frederick Garfield Waite, their attorney, and

109 The United States of America, defendant in error, by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands attorney for said defendant in error, that the above record, consisting of 105 typewritten pages shall be and is hereby settled and agreed upon between the parties to this cause as the true and correct record to be transmitted by the clerk of the supreme court of the Philippine islands to the clerk of the Supreme Court of the United States and that said above described record is and shall constitute the full and complete record in the above entitled cause to be presented in said cause to the Supreme Court of the United States for its adjudication and final action.

In witness whereof the said parties above named have hereunto set their hands at the city of Manila, Philippine islands, this 19th day of December, A. D., 1903.

FREDERICK GARFIELD WAITE,
Attorney for Plaintiffs in Error.
LEBBEUS R. WILFLEY,
Attorney for Defendant in Error.

Filed in the clerk's office of the supreme court of the Philippine islands this 22 day of Dec. 1903 8.56 a. m.

F. C. FISHER, *Clerk*,
By H. D. McGEORGE, *Deputy*.

110 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

FRED L. DORR and EDWARD F. O'BRIEN, Plaintiffs in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Certificate.

THE UNITED STATES OF AMERICA, *Philippine Islands*, } *ss*:

I hereby certify that the above record and stipulations thereto attached, consisting of 109 typewritten pages, is a true and correct record of the proceedings had in the court of first instance of the city of Manila, Philippine islands, and the supreme court of the Philippine islands, in the above entitled cause as agreed upon between the parties to said cause, and that the same was compiled by me in conformity with the expressed desire and instructions of the parties to said cause, acting through their respective counsel. and,

That I am thoroughly conversant with both the Spanish and English languagges and that the translations of all the documents contained in said record were made by me or carefully revised and corrected by me, and that the same are a true and correct translation from Spanish into English of the respective documents therein referred to and that said precedent record is a true and correct translated record of all of the proceedings in said cause in so far as such proceedings are included in said record under the instructions of the legal representatives of the parties to said cause.

In witness whereof I have hereunto set my hand, and cause- to be affixed hereto the seal of the supreme court of the Philippine islands, this 21 day of December A. D., 1903.

[Seal Corte Suprema Islas Filipinas.]

F. C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

Endorsed on cover: File No. 19,234. Philippine islands, supreme court. Term No. 583. Fred L. Dorr and Edward F. O'Brien, plaintiffs in error, *vs.* The United States. Filed February 11th, 1904. File No. 19,234.

3373

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 584.

SUCUNDINO MENDEZONA Y MENDEZONA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

FILED FEBRUARY 11, 1904.

(19,235.)

33733

(19,235.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 584.

SUCUNDINO MENDEZONA Y MENDEZONA, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

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1 THE UNITED STATES OF AMERICA, }
Philippine Islands. }

In the Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
SECUNDINO MENDEZONA MENDEZONA, Defendant and Appellee. } Cause No. 1002.

Record.

Be it remembered that on the 21st day of February, A. D. 1902, an information was filed in the clerk's office of the court of first instance of the city of Manila, in the above entitled cause, then numbered 247, by W. H. Bishop, prosecuting attorney of the city of Manila, of which the following is a true copy as translated into English, to-wit:

"UNITED STATES OF AMERICA, }
Philippine Islands. }

In the Court of First Instance of the City of Manila.

THE UNITED STATES OF AMERICA
vs.
SECUNDINO MENDEZONA. } Information.

The undersigned accuses Don Secundino Mendezona Mendezona of the crime of swindling, committed as follows:

That on the 10th day of September, 1900, in the city of Manila, island of Luzon, Philippine islands, the said Don Secundino Mendezona Mendezona, as the sole managing partner of the firm of Mendezona & Co., wilfully and knowingly made and executed a certain pledge in favor of the Compania General de Tabacos de Filipinas, before Don Enrique Barrera y Caldes, a duly authorized notary public, by public instrument No. 724, in which said instrument the said Don Secundino Mendezona Mendezona represented and certified as follows: 'In guarantee of the amounts furnished up

2 to the present by the Compania General de Tabacos de Filipinas, as also for the amounts it shall furnish up to said amount of $300,000.00 Mex., Messrs. Mendezona and Company, and in their name, Secundino Mendezona Mendezona, constitute as pledge in favor of the crediting company, 20,000 bales of hemp, shipped from Sorsogon, Legaspi, Tabaco and Lagonoy, said bales

being deposited in their storehouses or go-downs, located in Isla de Romero street No. 48, and he solemnly declares that said 20,000 bales were not disposed of, ceded nor incumbered with any charge; and in sign of possession and delivery, Mr. Mendezona delivers herewith to the representative of the "Compania General de Tabacos de Filipinas," the keys of the warehouses or go-downs where said 20,000 bales of hemp pledged are deposited."

That on said 10th day of September, 1900, in said city of Manila, the aforesaid Secundino Mendezona Mendezona delivered unto the Compania General de Tabacos de Filipinas, the possession of all the hemp contained in said warehouses and storehouses situated at No. 48 Calle de la Isla de Romero, at that time by delivering unto said company the keys thereof, under and in pursuance of said document No. 724.

That the facts so represented and certified by Secundino Mendezona Mendezona, in said document No. 724, as aforesaid, were false and untrue in this:

(*a.*) That the warehouses and storehouses in said document referred to did not contain 20,000 bales of hemp at the time of the execution of said document and of the making of said pledge, but, on the contrary, the contents thereof did not exceed 12,000 bales of hemp, as said Secundino Mendezona Mendezona then and there well knew.

(*b.*) That a great part and number of the bales of hemp specifically enumerated in said document by marks and numbers,
3 did not exist, but, on the contrary, said part and number of the same was wholly imaginary and unreal, as said Secundino Mendezona Mendezona then and there well knew.

(*c.*) That at the time of the execution of said document, and of the making of said pledge, the bales of hemp contained in the aforesaid warehouses and storehouses, situated at No. 48 Isla del Romero street, were not free of any incumbrance, but, on the contrary, a great part of said bales of hemp were then pledged to the "Banco Espanol Filipino" to secure the payment of a loan of $200,000.00 Mexican, made on the 18th day of April, 1900, as the aforesaid Don Secundino Mendezona Mendezona then and there well knew; and a part of said bales of hemp were then pledged to the "Chartered Bank of India Australia and China," to secure the payment of another loan of $250,000.00 Mexican, made on the 24th day of August, 1900, as the aforesaid Secundino Mendezona Mendezona then and there well knew.

(*d.*) That at the time of the execution of said document 724 and of the making of said pledge, the bales of hemp contained in said warehouses and storehouses were not all the property of said firm of Mendezona and Company, but, on the contrary, a part thereof were held on deposit in said warehouses and storehouses, at the disposition of the owners thereof, Don Angel Ortiz, Don Francisco Reyes, and the widow of Tan Auco, as said Don Secundino Mendezona Mendezona then and there well knew.

That by virtue and by means of said false and fraudulent representations, so made as aforesaid by said Secundino Mendezona Mendezona, the said Secundino Mendezona Mendezona wilfully and knowingly deceived and defrauded said Compania General de Tabacos de Filipinas, by obtaining and securing from said company in favor of Mendezona and Company, a loan of $300,000.00 pesos Mexican, more or less, contrary to the statute in such case made and provided.

(S'g'd) W. H. BISHOP,
Prosecuting Attorney."

4 And that thereafter and on the 22nd day of April, A. D., 1902, an alias order of arrest was issued in said cause by the Honorable William J. Rohde, one of the judges of the court of first instance of the city of Manila, a true copy of which with return thereon, translated into English, is as follows:

"*Order of Arrest.*

To the sheriff of Manila:

You are hereby authorized to arrest Secundino Mendezona said to be in the city of Manila, who has been charged with the crime of estafa, and to bring him before me without delay for further proceedings in accordance with law.

Dated at Manila, P. I., this the 22nd day of April, 1902.

(S'g'd) WM. J. ROHDE, *Judge.*

[Seal of Court of First Instance, Manila.]"

And that thereafter, and on the 22nd day of April, A. D., 1902, said arrest was duly made.

And that thereafter and on the 22nd day of April, A. D., 1902, the amount of said defendant's bail was fixed at the sum of twenty thousand Mexican pesos, and bail in the sum mentioned was furnished by good and sufficient sureties and approved by said Honorable Wm. J. Rohde, judge of said court of first instance of the city of Manila.

And that thereafter and on the 29th day of April, A. D. 1902, at the instance and request of said defendant, Don Alfredo Chicote y Beltran was named by said Judge Wm. J. Rohde, attorney "*de officio*" for said defendant.

That thereafter and after various preliminary motions had been heard and determined, and on the 7th day of June, A. D. 1902, in said named court of first instance, said defendant plead not guilty to the charge alleged against him in said complaint, and a trial of said cause was duly had before the Honorable William J. Rohde, presiding judge of the court of first instance of the city of
5 Manila, at which said trial Señor Constantino appeared as prosecuting attorney, in association with Don Jose Robles

Lahesa, Don Francisco Ortega and Mr. Charles Davis, attorneys for the private prosecutor, "La Compania General de Tabacos de Filipinas," and said Don Alfredo Chicote y Beltran as attorney for said defendant, and said trial proceeded from day to day and from time to time, until, on the 28th day of July, A. D. 1902, said defendant was acquitted by the said Hon. Wm. J. Rohde, judge of said court of first instance of the city of Manila, and declared free from said accusation, as appears by a true copy translated into English, of the opinion of said judge, bearing date of July 28th, 1902, which is as follows:

"THE UNITED STATES OF AMERICA,
Philippine Islands.

In the Court of First Instance of the City of Manila, Part 1.

THE UNITED STATES OF AMERICA
vs.
SECUNDINO MENDEZONA MENDEZONA.

Judgment.

On or about the 20th day of August, 1900, the Compania General de Tabacos de Filipinas conceded to Messrs. Mendezona and Company, in account current, a credit of three hundred thousand pesos, Don Secundino Mendezona Mendezona undertaking to give security without fixing the amount thereof or the date on which it was to be given. On September 10th, 1900, Mr. Correa, as manager of the Compania General de Tabacos de Filipinas, and Don Secundino Mendezona Mendezona, on behalf of Messrs. Mendezona and Company, by public document entered into the following agreement:

"The party of the first part (Mendezona) having made application to the Compania General de Tabacos de Filipinas for the concession to the firm which he represents, for a credit of three hundred thousand pesos, for the purpose of enabling said firm to properly carry on its business in Sorsogon, Legaspi and Tabaco, Señor
6 Correa, on behalf of said company, has agreed to enter said credit on behalf of Mendezona and Company, and, in order that the obligations and conditions agreed upon may be evidenced by an authentic document, the parties hereto, in their respective characters, execute this instrument upon the following terms and conditions:

First. The Compania General de Tabacos de Filipinas grants to Messrs. Mendezona and Company a credit not to exceed three hundred thousand Mexican pesos, of which the latter may dispose in such proportion and in such amounts as they may see fit, drawing upon said credit either in money or goods.

Second. The Compania General de Tabacos de Filipinas, by reason of the credit conceded, will open in its books an account current in the name of Mendezona and Company, in which shall be recorded the entries concerning drafts up to the said sum of three hundred thousand pesos which may be made by Messrs. Mendezona and Company, as well as such sums as they may pay on account thereof.

Third. Messrs. Mendezona and Company, by their representative Secundino Mendezona Mendezona, undertake to pay to the Compania General de Tabacos de Filipinas a fixed interest of eight per cent. per annum upon the debit balances of the account current opened to them, which interest shall commence to accrue from the date of the first payment or delivery of goods which may be made.

Fourth. Messrs. Mendezona and Company, represented by Secundino Mendezona Mendezona, acknowledge to have received from the Compania General de Tabacos de Filipinas, on account of the credit opened to them, the sum of $171,506.52 pesos, of which receipt they make the most formal acknowledgment necessary in law for the security of the Compania General de Tabacos de Filipinas.

Fifth. The effect of this contract shall cease on the 31st day of December of this year, upon which date the account current opened to Messrs. Mendezona and Company shall be liquidated in toto, the undertaking on said date to return to the Compania General
7 de Tabacos de Filipinas such balance as may be found in favor of the latter, making such payments either in cash or in hemp, in which latter event the value of this article shall be computed in accordance with the current quotations in the market on the said 31st day of December, A. D., 1906, less one peso per picul from the current market price.

Sixth. As security for the amounts heretofore advanced by the Compania General de Tabacos de Filipinas, as well as for such amounts as it may hereafter advance, up to the sum of three hundred thousand pesos, Mesrs. Mendezona and Company, represented by Secundino Mendezona Mendezona, pledge to the creditor corporation twenty thousand bales of hemp from Sorsogon, Legaspi and Lagonoy, which are deposited in their warehouses at Isla de Romero street No. 48, solemnly declaring that said twenty thousand bales of hemp are not sold, assigned or encumbered with any gravanem, and as a symbol of possessiona and delivery, Secundino Mendezona Mendezona now delivers to said representative of the Compania General de Tabacos de Filipinas the keys of the warehouses in which are deposited the twenty thousand bales oh hemp pledged, the classes and marks of which are specified hereinafter in detail."

2.

On the 26th day of September, 1900, Messrs. Mendezona and Correa, by a public instrument, entered into the following agreement:

"Second. That as security for the sums of money up to the present time advanced by the Compania General de Tabacos de Filipinas to Mendezona and Company, by reason of the credit mentioned, Don Secundino Mendezona pledged to the creditor corporation, twenty thousand bales of hemp from Sorsogon, Legaspi, Tabaco and Lagonoy, which are deposited in the warehouses of Messrs. Mendezona and Company situated at No. 48 Isla de Romero street,
8 district of Santa Cruz, the marks and classes of which are specified in detail in said instrument.

Third. That, by mutual agreement, the parties hereunto have determined to exchange the said twenty thousand bales of hemp pledged by the instrument above referred to, for another twenty thousand bales, the classes and marks of which shall be recorded in detail from time to time as the recount thereof proceeds, which recount, once completed, and after the marks and classes of the said twenty thousand bales of hemp (have been determined, there shall be pledged to the Compania General de Tabacos de Filipinas, in substitution of the twenty thousand bales of hemp) pledged as security for the credit referred to by the instrument dated the 10th instant, upon the express understanding that the bales of hemp which shall be counted from day to day and delivered by Mendezona and Company and identified as to their respective classes and marks shall thereupon be held in pledge for the purposes of the instrument referred to."

3.

The hemp was recounted on the 26th of September and following days, and twenty thousand bales of hemp were given in pledge.

4.

By public instrument of the 12th of December, Señor Correa annulled and cancelled the security given by Messrs. Mendezona and Company in favor of the Compania General de Tabacos de Filipinas, by the pledging of 20,000 bales of hemp as security for the credit in account current up to three hundred thousand pesos, in order to become a common creditor as to all property of Mendezona and Company.

December 12th, Mendezona and Company had in Manila 63,000 bales of hemp and 15,000 bales in the provinces. The accused testifies that the giving of these various securities, referred to
9 in this cause, was rather a matter of form than the giving of actual security, and this, in addition to the fact that it was not denied by the persons who were the parties to those agreements, appears to be corroborated by the facility with which the firm of Mendezona and Company succeeded in obtaining credits in large amount in the year 1900.

If the defendant is to be found guilty, it will be necessary to consider as proven the inexactness of the public documents of the 26th

and 27th of September and the 13th of December, even upon the supposition that the pledging of the 20,000 bales of hemp was the cause which led to the granting of the credit.

Upon all the proofs I consider the documents last mentioned as containing a faithful expression of the truth, this being a necessary consequence in view of the silence of Messrs. Churruca and Correa.

Señor Don Secundino Mendezona Mendezona gave up the management of Mendezona and Company, as a matter of fact, on the 28th of September.

From the amount of hemp that the firm had on hand on December 13th, it is plainly evident that the defendant had more than enough hemp for the purposes of giving the required security.

It has been over a year since the stock of hemp in question was exhausted and, approximately, two years since the defendant ceased to be manager of Mendezona and Company.

In view of this, very conclusive evidence of the defendant's guilt of the offense charged will be necessary to overcome this authentic documentary evidence.

I do not consider that the charge has been proven and I therefore acquit the defendant.

Manila, July 28th., 1902.

(S'g'd) WM. J. ROHDE, *Judge.*

10 "Received copy of the above judgment, to-day, July 28th, 1902.

(Signed) S. MENDEZONA.
ALFREDO CHICOTE."

A copy of the above judgment was sent to the fiscal this 28th day of July, 1902.

(Signed) MARCELO CARINJA,
Deputy Clerk."

Which said judgment and sentence was duly recorded.

That thereafter and on the 28th day of July, A. D. 1902, an appeal was taken from said verdict and judgment of acquittal in said court of first instance, by the Honorable Libbeus R. Wilfley, attorney general of the Philippine islands, to the supreme court of the Philippine islands, which said appeal was duly perfected.

That thereafter said cause was duly placed upon hearing in the supreme court of the Philippine islands, and after due argument of counsel on behalf of both the State and the defendant, said defendant was, by the decree and judgment of the said supreme court, found guilty of the crime charged against him, and condemned to the punishment of two years, eleven months and ten days of "presidio correcional," to the suspension of all public duty, profession, office or right of suffrage, and to the payment of the costs of both tribunals, as will fully appear by a true and correct copy of said decree and judgment of said supreme court of the Philippine islands, translated into English, which is as follows:

11 THE UNITED STATES, Complainant and Appellant,
vs.
SECUNDINO MENDEZONA Y MENDEZONA, Defendant and Appellee. (No. 1002.)

JULY 25, 1903.

On the merits.

1. *Criminal law; estafa; pledge.*—The defendant, representing that he had a certain quantity of hemp in his warehouse, negotiated a loan, and pledged this hemp as security to the creditor, to whom he made symbolic delivery by turning over the keys of the warehouse. After large payments had been made on account of the loan it was discovered that the total number of bales of hemp in the warehouse at the time of the loan and pledge was much less than that represented by the defendant, and that part of the hemp so pledged was the property of others: *Held*, That the defendant is guilty of the crime of *estafa*, as defined in article 534, No. 3, of the Penal Code.
2. *Id.; ingredients of offense.*—Deceit employed with the intent to defraud, and damage (*perjuicio*) to the person defrauded are the essential ingredients of the crime of *estafa*.
3. *Id.; deceit.*—One who obtains a loan by falsely representing himself to be the owner of personal property pledged as security therefor is guilty of the deceit which is one of the essential elements of the crime of *estafa*.
4. *Id.; damage.*—One who lends money under the erroneous belief, induced by the false representation of the debtor, that he is secured by a valid lien on personal property, suffers such damage (*perjuicio*) as constitutes the second essential element in the crime of *estafa*.
5. *Id.; compromise; civil liability.*—Subsequent agreements between the parties with respect to the civil liability arising from the commission of a crime does not affect the right of the Government to prosecute the criminal, notwithstanding complete restitution to the property injured.

On application for a rehearing.

6. *Criminal law; jeopardy.*—An appeal by the Government from a judgment of acquittal does not put the defendant twice in jeopardy for the same offense.

Appeal from a judgment of the court of first instance of Manila.

The facts are sufficiently stated in the opinion of the court.

Solicitor-General Araneta, for appellant.
Alfredo Chicote, for appellee.

TORRES, *J.*:

This was an appeal from a judgment of July 28, 1902, entered in case No. 247 of the court of first instance of this city for *estafa*, by which the defendant was acquitted.

On May 12, 1902, the attorney-general filed the complaint appearing on page 1 of the record and amended as shown on page 50, charging Don Secundino Mendezona y Mendezona with the crime of *estafa*, committed as follows: That on September 10, 1900, in the city of Manila, capital of the Philippines, Mendezona, sole manager of the partnership of Mendezona & Co., wilfully and knowingly made and executed before Don Enrique Barrera y Caldes, a duly authorized notary public, a certain contract of pledge in favor of the Compañía General de Tabacos de Filipinas, by means of public document No. 724, in which the accused sets forth and agrees to the following: As security for the sums already advanced by the Compañía General de Tabacos de Filipinas, as well as for those which may hereafter be advanced up to the sum of $300,000, Mendezona & Co., represented by Don Secundino Mendezona, pledge, in favor of their said creditor, 20,000 bales of Sorsogon, Legaspi, Tabaco, and Lagonoy hemp, at present stored in their warehouses located at No. 48 Isla de Romero street, solemnly affirming that the said 20,000 bales have been neither assigned, transferred, nor encumbered, and in token of the delivery of the possession thereof the said Mendezona thereupon surrendered to the representative of the said Compañía General de Tabacos the keys of the said warehouses in which were stored the 20,000 bales of hemp pledged.

That on the said 10th day of September, 1900, the said Mendezona delivered, in the city of Manila, to the Compañía General de Tabacos the possession of all the hemp that day contained in the warehouses situated at No. 48 Isla de Romero street by surrendering to the said company the keys thereof, in accordance with the terms of the said document No. 724.

That the facts thus set forth and affirmed by the said Mendezona in the said document were false and untrue in this particular, to wit: that the warehouses mentioned in the said document did not contain, at the time of the making and execution of the contract of pledge, 20,000 bales of hemp, but, on the contrary, their contents did not exceed 12,000 bales, as the said Mendezona well knew at the time; and that a considerable number of the bales specifically enumerated by marks and figures in the document referred to had no existence, but, as a matter of fact, such bales, purporting to be designated by marks and figures, were entirely imaginary, and that this was well known to the accused, Mendezona.

That at the time of the execution of the said document and the pledging of the hemp, the said bales of hemp contained in the warehouses at No. 48 Isla de Romero street were not free from encumbrance, but, on the contrary, a large part of the same was pledged to the Spanish-Filipino bank as security for the payment of

a loan of 200,000 Mexican pesos, the said loan having been made on the 18th day of April, 1900, of which the said Secundino Mendezona was well aware.

That a part of the said bales of hemp were pledged to the Chartered Bank of India, Australia, and China as security for another loan of 250,000 Mexican pesos, made the 24th day of August, 1900, which was also well known to the said Secundino Mendezona.

That at the time of the execution of the said document No. 724 and the making of the said contract of pledge by the said Mendezona, the bales of hemp contained in the said warehouses were not all the property of Mendezona & Co., but, on the contrary, a part of the same was stored in the said warehouses subject to the disposal of Don Angel Ortiz, Don Francisco Reyes, and the widow of the Chinaman Tan-Auco, the owners thereof, all of which was well known to the said Don Secundino Mendezona y Mendezona.

And that, by virtue and by means of the said false and
12 fraudulent representations made by the said Secundino Mendezona y Mendezona, the latter fraudulently obtained for the partnership of Mendezona & Co. from the said Compañía General de Tabacos, in consideration of the pledge falsely and fraudulently made, a credit of 300,000 pesos, of which amount there was delivered the sum of $207,814.01; that by this operation thus fraudulently consummated, he defrauded the Compañía General de Tabacos, inasmuch as the latter, instead of having been able to recover, long before the date of the complaint, the entire sum advanced to Mendezona & Co., together with the interest stipulated, as would have been the case if the security given had been real and *bona fide*, owing to the falsity and consequent insufficiency of such security the said Compañía General has been compelled to forego the recovery of the stipulated interest which has accrued, and up to the date of the complaint was unable to recover the total amount actually delivered to Mendezona & Co., there still lacking for this purpose 50 per cent. of such amount; this against the statute in the case made and provided. Upon filing the preceding complaint a preliminary investigation was had, and, notwithstanding the exception entered by the accused, the action was commenced, the latter's demurrer being overruled by an order of June 6, 1902, and the accused being commanded to answer the charge on the day fixed.

From the documentary and oral evidence introduced in this cause it appears that during the last days of August, 1900, Don Secundino Mendezona, in the name of the partnership of Mendezona & Co., induced the general manager of the Compañía General de Tabacos de Filipinas to open an account-current with his firm, with credit up to the sum of 300,000 pesos, and that Don Secundino Mendezona commenced to make use of the credit granted on the 27th of the said month of August, drawing considerable sums in money and goods up to the 5th of September following, at which time his drafts from the vaults and storehouses of the Compañía

General amounted to the respectable sum of $171,506.52. (Pp. 162–165, Record—documentary evidence.)

About September 7, 1900, at the request of the head manager of the Compañía General, it was agreed between the said company and the accused Mendezona that the latter should execute, as security for the said credit, a contract of pledge on the 20,000 bales of hemp stored in the warehouses at No. 48 Isla de Romero street, and the document No. 724 was accordingly executed on September 10, 1900, before the notary public Señor Barrera, signed, on the one hand, in the name of the firm of Mendezona & Co., by Don Secundino Mendezona y Mendezona, the manager thereof, and on the other by Don Antonio Correa y Pomar, as general manager of the Compañía General de Tabacos de Filipinas, there appearing in the said document, among others, the following stipulations: That Mendezona & Co., represented by Don Secundino Mendezona, bound themselves to the payment to the Compañía General de Tabacos of interest at the rate of 8 per cent. per annum on the outstanding balance of the account-current opened with them, the said interest to begin from the date of the first draft made, the debtors affirming that they had already received from the Compañía General on account of the credit allowed them the sum of $171,506.52, and the date for the termination of the contract being fixed at December 31, 1900, when the account opened with the said Mendezona & Co. would be wholly liquidated, the said Mendezona & Co. binding themselves to return to the Compañía General, on the date referred to, any balance that might exist in favor of the latter; and that, as security for the sums already advanced by the said Compañía General, as well as for any that might thereafter be advanced up to the said $300,000, Don Secundino Mendezona, in the name of Mendezona & Co., pledged in favor of their said creditor, 20,000 bales of Sorsogon, Legaspi, Tabaco, and Lagonoy hemp, then stored in their warehouses at No. 48 Isla de Romero street, declaring that the said 20,000 bales had not been assigned, transferred, or in any way encumbered, and, in token of the delivery of the possession thereof, the said Mendezona thereupon delivered to the representative of the Compañía General the keys of the warehouses in which were stored the 20,000 bales of hemp pledged, the marks and classes of which are fully enumerated in the said instrument or document (Record, documentary evidence, pp. 50–62), it being admitted between the parties (Record, p. 387) that the delivery of the said keys was actually accomplished, as set forth in the instrument referred to.

Some days after the execution of the above-mentioned document No. 724, dated September 10, 1900, owing to a statement by Don Carlos las Heras, the consulting engineer of the Compañía General, made as the result of a visit with Señor Churruca, the assistant manager, to the principal warehouse on Isla de Romero street about the middle of that month, and of a rough calculation which he had made concerning the number of bales of hemp stored therein, to the effect that in his opinion there were only about 12,000 of such bales,

the general manager of the Compañía Tabacalera, Don Antonio Correa, ordered the said Señor Churruca to visit Mendezona and acquaint him with the said statement of the consulting engineer, to the effect that there were not 20,000 bales of hemp in the said warehouse; that in the interview which followed between Mendezona and Señor Correa it was agreed that a recount of the bales stored should be made, in the presence of the notary public, Don Enrique Barrera, by a representative of the Compañía Tabacalera and an employee of the firm of Mendezona & Co.—Señor Fradua, the superintendent of the warehouse. The result of this recount was embodied in a new instrument dated September 26 of that year, and in a notarial act of the 27th of the same month.

It is to be noted that after the execution of the contract of pledge, by the instrument dated September 10, the firm of Mendezona & Co. continued to draw goods and money from the 11th to the 20th of the said month of September, the value of the goods and money thus received reaching the sum of $124,704.89, as appears from the running account (pp. 162, 163), which sum, added to that drawn at various times between the 31st of August and the 5th of September, make a total of $296,211.41, without reckoning accrued interest.

In the said instrument of September 26, 1900, No. 779, it was agreed between the parties thereto, Don Secundino Mendezona, as manager of the firm of Mendezona & Co., and Don Antonio Correa y Pomar, as manager of the Compañía Tabacalera, among other things, to exchange for the 20,000 bales of hemp pledged in the instrument No. 724 another 20,000 bales, the classes and marks of which were to be recorded in detail as the said bales should be counted, and that, once the recount should be confirmed and the classes and marks of the said 20,000 bales determined, the said 20,000 bales should immediately become subject to pledge in favor of the Compañía General de Tabacos, as security for the credit mentioned in the said instrument of September 10 of that year, in place of the 20,000 bales previously pledged; that, in order that the correctness of the said inventory might be unquestionable, they agreed that the said notary public should be installed in the warehouse in which were stored the said bales of hemp, and should record, in notarial acts, the number, classes, and marks of the bales delivered, and that the said notarial acts, as well as the said instrument, were to be considered as additional to the document No. 724 and dated September 10, 1900; and that the said notary public thus installed in the warehouses of Mendezona & Co., located at No. 48 Isla de Romero street, accordingly proceeded, in the presence of the parties interested, to recount the said bales of hemp delivered by Mendezona to the Compañía General de Tabacos, duly recording in the instrument the classes and marks of each bale, and it furthermore appears that the said notary also recounted a certain lot of bales of hemp stored in the warehouses of the Compañía General de Tabacos, which had been delivered to the latter by Mendezona, recording the classes and

marks of the said bales in the instrument shown on pages 128 to 139 of the record of documentary evidence.

The notarial act No. 782, executed September 27, 1900, by the said notary, Barrera, gives the result of the continuation of the inventory of the said bales pledged by Mendezona & Co. in favor of the Compañía General de Tabacos, as stipulated in the instrument executed the day before by the accused, Mendezona, and the general manager of the said Compañía General. Both Mendezona and the said general manager of the Compañía General were present, as above stated, at the counting of the bales of hemp whose classes and marks are recorded in the said notarial act. It also appears from the latter that an inventory was made of the bales contained on the lighters and boats mentioned in the said act (pp. 140–150).

The record discloses the fact that some time between the 19th and 21st of September, 1900, some ten or eleven days after the execution of the instrument of the 10th above referred to, and the pledge of the 20,000 bales of hemp, upon an examination being made of the warehouse in which the hemp was deposited, and after a careful calculation made by the engineer and two of the company's warehousemen, it was found that there were only 10,900 bales of hemp there, more or less. This result appears to be confirmed by the books showing the receipt and discharge of hemp in Mendezona & Co.'s warehouse on Isla de Romero street. It is also confirmed by the testimony of Don Ramón Caro, Mendezona's warehouseman, who examined the books and who, in view of the result, drew up the statement of the stock of hemp which the firm of Mendezona & Co. at that time had, which statement forms part of the record. Furthermore, Señor Garriz, one of the members of the firm, testified in the case that on the 10th of September, 1900, there were not 20,000 bales of hemp in the Isla de Romero Street warehouse, and that on this account Mr. Correa, being alarmed at the insufficiency of the security and the defendant Mendezona having been informed thereof, the latter undertook to complete the 20,000 bales pledged. It is also worthy of note that when Fradua, the warehouseman, was required by Fernandez, one of the clerks of the Tabacalera Company, to show the warehouse books for the purpose of the recount which they were about to make, the former replied that he had no book.

It also appears that a part of the hemp contained in the Isla de Romero Street warehouse—that is, 2,238 bales of the hemp—was not the property of Mendezona & Co., but that 700 bales belonged to Don Angel Ortiz, 1,081 bales to Don Francisco Reyes, and 457 to the widow of the Chinaman Tan-Auco. this hemp having been stored in this warehouse subject to the disposal of the owners. This fact is fully established in the record by authentic documents which show the amount of hemp received at the warehouse and by the receipts given for the hemp belonging to the persons who had stored it there, as well as by the testimony of the accused, Mendezona. that of Don Angel Ortiz, and that of the representatives of Don Francisco Reyes and the widow of Tan-Auco. The same fact is established by the

testimony of Don Ramón Caro, who at that time was a clerk of Mendezona & Co. He identified the warehouse receipts given for the hemp stored in the Isla de Romero Street warehouse and which was on hand therein on September 10, 1900. The same fact is shown by the entries in the books showing the receipts at and shipments of hemp from the warehouse. The letters, one dated on the 7th and the other on the 19th of December, 1900, written by Mendezona to the general manager of the Tabacalera Company, asking for authority to withdraw from the warehouse certain bales of hemp belonging to the widow of Tan-Auco and to Messrs. Ortiz and Reyes, also clearly establish this fact, the letter dated the 7th stating that the 32 bales which had been pledged to the company and which should be delivered to Don Francisco Reyes would be replaced by 32 other bales.

It is to be observed that the hemp belonging to Francisco Reyes and Angel Ortiz and to the widow of Tan-Auco was included in the recount of the bales recorded in the instruments of the 26th and 27th of September; and if, on the 27th of September, the hemp belonging to these persons was in the Isla de Romero Street warehouse, and after a careful recount, effected between September 26 and October 2, 1900, all the hemp in the Isla de Romero Street warehouse and at other places was turned over to the Tabacalera Company and the authority of the company was required for the return of this hemp to its owners, it is unquestionable that these bales were included in the instruments found on pages 128 and 140 of the documentary evidence, and were also included in the subsequent recount conducted up to the 2d of October, in the course of which up to 20,414 bales of hemp were counted, which number was not recorded in these public instruments, which show only 18,413 counted during the 26th and 27th of September, all of which appears from the testimony of Don Baldomero Fernandez.

It is also a fact fully proven that Don Secundino Mendezona, by a private document dated the 18th of April, 1900, for the purpose of securing a loan of $200,000, pledged to the Spanish-Filipino bank 10,000 bales of hemp which he asserted were stored at his warehouses on Isla de Romero and Anloague streets, binding himself to hold this hemp as a deposit. This fact appears from a document shown on page 69 of the record, the authenticity of which has been admitted by the defendant. It is also corroborated by the testimony of Don Ramón Caro, who states that there were 2,255 bales of hemp in the Isla de Romero Street warehouse which formed part of the 10,000 bales pledged to the Spanish-Filipino bank, this fact appearing from the books which he had examined.

It is also a fact proven by the evidence that, for the purpose of securing a loan of $250,000 the defendant Mendezona, by a public instrument of August 24, 1900, pledged to the Chartered bank 10,002 bales of hemp which he asserted were on deposit at the warehouse located at No. 48 Isla de Romero street. He delivered to the agent of the bank the keys of this warehouse and placed the hemp so pledged at the disposal of the creditor, in conformity with the

fourth clause of the contract, appearing on page 63 of the record, the authenticity of which has also been admitted by Mendezona. The fact that the keys were actually delivered is also confirmed by the testimony of Don Baldomero Fernandez, who stated that on the morning of the 25th of September, 1900, while engaged in recounting the hemp at the Isla de Romero Street warehouse, an Englishman came and asked the warehouseman, Fradua, which was the lock corresponding to the key he had with him, and tried this key on the new padlocks, and, not having succeeded in opening them, went away; that between 5 and 6 in the afternoon of that day another Englishman came in and demanded the delivery of the keys of the warehouse, to which demand the witness refused to accede; that he reported the matter to Mr. Correa, the general manager of the Tabacalera Company, who sent his son, who spoke English, to make inquiry; that after some conversation between Correa's son and the Englishman the latter went away, the witness adding that he subsequently learned that this man was one of the managers of the Chartered bank. The witness Ramón Caro, the clerk of Mendezona & Co., testified (Record, pp. 136, 219) that on the 10th of September, 1900, according to the books of the warehouse located at No. 48 Isla de Romero street, there were at the warehouse 4,251 bales which were part of the 10,002 pledged to the Chartered bank. It is also a proven fact that on August 24, 1900, Don Secundino Mendezona, as manager of Mendezona & Co., pledged to the Hongkong-Shanghai Banking Corporation, by a public instrument, 16,699 bales of hemp, which he stated were on deposit in the warehouses of Doña Cornelia Laochangco at Tanduay. This pledge was to secure a loan of $400,000, and the keys of the Tanduay warehouse were accordingly delivered to Mr. Jones, the agent
13 of the bank, and the hemp pledged placed at his disposal, in accordance with clause 4 of the contract, which appears on page 70 of the documentary evidence. The defendant Mendezona and the witness Venancio de Jesús corroborated this statement as to the delivery of the keys to the agent of the bank.

Notwithstanding the context of this instrument of September 26, the record contains sufficient evidence to show unquestionably that there was no substitution or exchange of the 20,000 bales of hemp for 20,000 other bales which were formerly stored in the Isla de Romero Street warehouse. What was done in the presence of the notary Barrera, in accordance with the agreement between Mendezona, the defendant herein, and Señor Correa, the general manager of the Tabacalera Company, was to have a recount made of the hemp in Mendezona & Co.'s warehouses, for the purpose of dissipating the doubt or belief on the part of the creditor corporation that the warehouses did not contain the 20,000 bales of hemp pledged by the contract of September 10; and to complete the 20,000 bales so given as security, according to the statement of Don Florencio Garriz, a member of the firm of Mendezona & Co. (Record, p. 81), in the course of the making of the inventory several thousand bales

of hemp, part of which arrived by the steamer *San Nicholas* and part being taken from the Tanduay, Anloague, and Barraca warehouses, were taken to the Isla de Romero warehouse, apart from the 1,700 bales which arrived on the steamer *Union*, and the 21 bales which were taken from a casco. All these bales of hemp, added to the 10,900, which, according to the calculation made and according to the books of the firm, were the total amount in the warehouse September 10, 1900, the date of the pledge, made a total of 20,414 bales, after the making of the recount. The fact that the hemp was taken into the Isla de Romero warehouse is shown by entries in the books corresponding to the Tanduay, Anloague, and Barraca warehouses, and by other documents in the record, some of which have been identified by Venancio de Jesús, a clerk of Mendezona & Co. The fact that the hemp was so taken into the warehouse was also shown by the testimony of Don Baldomero Fernandez, a representative of the Tabacalera Company, who took charge of the warehouses after September 10, and also by the witness Don Ramón Caro, a clerk of Mendezona & Co.

According to the documents dated the 23d of July and the 30th of June, 1900 (Record, pp. 76, 84), Mendezona & Co., to secure two loans, one of $250,000 and another of $425,000, from the Chartered bank, pledged a warehouse receipt issued by Messrs. Stevenson & Co. for 505 bales of hemp, and several warehouse receipts issued by Mr. J. Sloan for 22,311 bales stored in the Tanduay warehouses.

On September 20, 1900, Mendezona & Co. indorsed to the Chartered bank several warehouse receipts signed by Mr. Sloan, representing 2,745 bales of hemp, as security for a loan of $200,000.

On April 18, 1900, Mendezona & Co. pledged to the Spanish-Filipino bank, as security for a loan of $200,000, 10,000 bales of hemp stored in the Anloague and Isla de Romero warehouses; and on June 21 of the same year they pledged another 10,000 bales of hemp stored in the Tanduay warehouses, as security for another loan of $200,000. These facts are shown by documentary evidence in the record.

From the testimony of the defendant Don Secundino Mendezona and that of his partner, Don Florencio Garriz, it appears that on account of the heavy fall in the price of hemp in the market of this city and of heavy losses suffered, the firm of Mendezona & Co. found itself heavily indebted and unable to meet its obligations, for which reason the manager of the company, Don Secundino Mendezona, the defendant herein, after having consulted his partners concerning the situation, on September 28, 1900, found himself compelled to suspend payments, and went to Señor Barrera, a notary public, and informed the latter of this situation, asking him to make out the necessary statement required by the code of commerce. But the notary Barrera, instead of doing so, told the defendant that he would undertake to see the managers of the banks and try to make arrangements to enable the firm to continue, and that Barrera, in view of the de-

fendant's determination to suspend payments, assured him that he could arrange matters.

As a result of the conferences held between the principal creditors and some of the members of the firm of Mendezona & Co., an agreement was entered into, which was recorded in a public instrument dated October 7, 1900, in which it was stated that, in consideration of the heavy losses which had been suffered by the firm and other special circumstances which had compelled it to suspend payments, the principal creditors, among them the Tabacalera Company, represented by Don Antonio Correa, had decided to give their support in order that the firm of Mendezona & Co. might be able to meet its obligations, and among other things it was determined to modify the firm of Mendezona & Co., Messrs. Juan Ormaechea and Florencio Garriz entering the firm as partners and becoming the managers of the new firm, which was to be organized for a period of three years, to run from the 1st day of October, 1900; that these managers were to be subject to the resolutions of a board of inspection, composed of the managers of the Chartered bank, the Hongkong-Shanghai banking corporation, and the Spanish-Filipino bank, the general manager of the Tabacalera Company, some person to be appointed by the community of Augustinian fathers, and Don Isidro Arizaleta, or Don Fabian Artadi, whenever the latter should be in this city, the conditions under which the business was to be carried on being expressed in the contract. The three banks, the Tabacalera Company, and the community of Augustinian fathers opened with the firm of Mendezona & Co. a credit in account-current up to the sum of $250,000, which was subsequently extended to $800,000, at 6 per cent. per annum, this amount to be paid back in equal proportions. Eighty per cent. of the indebtedness of the firm to the Chartered bank, the Hongkong-Shanghai banking corporation, the Spanish-Filipino bank, the Tabacalera Company, and the community of Augustinian fathers was to be paid off, these creditors then to share with the other creditors as to the remaining 20 per cent. of their claims. By virtue of the preference granted in favor of the three banks, the Tabacalera Company, and the community of Augustinian fathers, the representatives of these creditor corporations solemnly bound themselves not to make use of the special securities held by each one of them, provided that the agreements established in this contract were enforceable and were carried out, but, on the contrary, if for any reason the agreements were not carried out, then the preferred creditors were entitled to avail themselves of their securities, and the waiver established in this clause of the contract was to be rescinded. Mendezona & Co. in turn undertook to give new security to the five preferred creditors as to 80 per cent. of their claims by executing in their favor a mortgage upon all their real property, vessels, etc., the same to be regularly recorded in the property register, and also by pledging to their said creditors all the hemp belonging to the firm in Mani a and the provinces, by means of the necessary instruments.

By an instrument dated December 12, 1900, the managing partners of the firm of Mendezona & Co., Don Juan Ormaechea and Don Florencio Garriz, acting in accordance with the authority conferred upon them by the instrument of October 13 of that year, and the creditors of the said firm, among them the Tabacalera Company, represented by its general manager, Don Antonio Correa y Pomar, declared that, owing to heavy losses suffered by the firm of Mendezona & Co., of which Don Secundino Mendezona was the sole partner, the firm was unable to meet its obligations at their respective maturities, and that therefore the said creditors, among them the representative of the Tabacalera Company, had agreed upon the conditions subject to which the firm might continue its business, which conditions were expressed in a notarial act of October 7, 1900, which was made a part of the contract now referred to; that the conditions stipulated in that act, having been complied with, the agreement was to be carried into effect, and that therefore the representative of the Tabacalera Company canceled and annulled the security given by Mendezona & Co. in favor of the Tabacalera Company, by a pledge of 20,000 bales of hemp, as security for a credit in account-current for $300.000, in accordance with the instrument of September 10, 1900, and modified by another instrument of the 26th of the same month, in which, as well as in the notarial act of the following date, appeared a statement of the bales pledged; that the managers Ormaechea and Garriz acknowledged to have received from the five principal creditors, among them the Tabacalera Company, the sum of $800,000, and to secure this sum, as well as 80 per cent. of the indebtedness of the firm to the said five principal creditors, which said 80 per cent. amounted to the sum of $3,109,344.28, they pledged to the said five creditors the bales of hemp described in the contract by marks and classes, as also the vessels of the firm, and executed a special mortgage upon the real property described therein, as well as an interest in the business and other property therein mentioned.

By a notarial act of the 1st of April, 1901, the managers and the several creditors of Mendezona & Co. agreed, among other things, to declare the firm of Mendezona & Co. dissolved, and their business was thrown into liquidation, the terms upon which the liquidation was to be conducted being expressed in the contract; that the liquidators were to be one or three, and in case the latter number should be decided upon then two of them should be appointed by the creditors representing two-thirds of the capital, and one by the other creditors; that on and after that date no credit should draw interest, with the exception of the account-current of the Spanish-Filipino bank, and it was unanimously resolved to release Messrs. Florencio Garriz, Juan Ormaechea, Secundino Mendezona, Román Echevarría, and Antonio Elizalde from all liability as managers and as partners.

In view of the facts established at the trial, as shown in the preceding statement thereof, can it be said that the crime of *estafa*, defined and

punished by article 534, paragraph 3, and article 535, paragraph 1, of the Penal Code, has been committed, as charged in the information, and as alleged in the brief of the solicitor-general? Our answer is in the affirmative.

Notwithstanding the fact that the defendant Secundino Mendezona plead not guilty to the charge of *estafa* brought against him, the record contains evidence of the existence of this crime, and more than sufficient proof to fully convince the mind of the guilt of the defendant of the *estafa* of a large sum of money, because, when the demand was made upon the defendant by the general manager of the Tabacalera Company to give security for the return or payment of the credit of $300,000, upon which he had already drawn $171,506.52, he executed public instrument No. 724, dated September 10, 1900, by which he pledged to the creditor company 20,000 bales of hemp which he pretended to have in his warehouse at No. 48 Isla de Romero street, the fact being that there were only 10,900 bales there, as shown by an expert calculation and by the stock books of this warehouse, which number of bales has been confirmed by the testimony of the witness, Don Ramón Caro, a clerk at that time of Mendezona & Co., who carefully examined these books; and this apart from the fact that there were in the warehouse at that time on storage 2,238 bales of hemp, 700 of which were the property of Don Angel Ortiz, 1,081 of Don Francisco Reyes, and 457 of the widow of Tan-Auco, which said bales so stored should have been deducted from the 10,900 bales of hemp which alone were in the warehouse at that time.

The existence of the crime is furthermore established by the proven facts that on September 10, 1900, there were in the warehouse at No. 48 Isla de Romero street, some 2,255 bales which were part of the 10,000 bales pledged to the Spanish-Filipino bank as security for a loan evidenced by an authentic document adduced in evidence (Record, p. 69); 4,251 bales which were part of the 10,002 bales of hemp pledged to the Chartered bank as security for a loan evidenced by a public instrument produced in evidence, in which instrument it appears that the keys of the said warehouse were delivered over as a symbol of the possession of the bales pledged; and that some 5,213 bales of said hemp had been pledged to the Chartered bank as security for another loan, evidenced by the document shown on page 126 of the record, the authenticity of which has been admitted by the defendant.

It is therefore unquestionable that there were at least 13,957 bales of hemp in that warehouse pledged to other creditors or belonging to other persons, as this fact is fully established by authentic documents, of which the first two documents of pledge indicate a greater number of bales pledged, the sum total of which show first, the truth of the statement of the witness Don Ramón Caro after an examination of the books of the firm, to the effect that of the 10,000 bales of hemp in stock September 10, 1900, in the warehouse at No. 48 Isla de Romero street, only 505 bales corresponded to the marks

and countermarks of the bales pledged in the instrument of that date; and second, that of the bales pledged to the two banks, the greater part of the hemp supposed to be in stock at the Isla de Romero warehouse was not there as stipulated, as there should have been at least 13,957 bales, the fact being that there were only 10,900, as stated.

It is sufficient for us to say that we neither affirm nor deny the validity and legal sufficiency of the pledges made on the 18th of April and the 20th of September, 1900, to the Spanish-Filipino bank and the Chartered bank. We have referred to them solely for the purpose of showing the fraudulent conduct of the accused when pledging 20,000 bales of hemp as security for indebtedness to the Tabacalera Company, there not being, as shown at the trial, any such number of bales of hemp in the Isla de Romero warehouse.

For the purpose of defining the crime and weighing the evidence taken, it is a matter of indifference that in December, 1900, the firm of Mendezona & Co. had 73,722 bales of hemp, because as against these figures we find others representing a larger amount of indebtedness and pledges, as security for the considerable sums borrowed. The question in issue is whether, on September 10, 1900, there were or were not 20,000 bales of hemp in the warehouse at No. 48 Isla de Romero street. The defendant has not proved that this amount was there, but, on the contrary, it has been demonstrated that there were scarcely 10,900 bales on hand, the greater part of which were either the property of third persons or had already been pledged to other creditors.

It is true that, a suspicion having arisen as to whether there were or were not 20,000 bales of hemp in that warehouse, they proceeded to make a recount, according to an agreement between the parties, and that the result of this operation showed that there were some 20,414 bales there, but it is also true that during the making of this recount thousands of bales of hemp were taken into this warehouse which had been brought from the Tanduay, Anloague, and Barraca warehouses and included in this recount, as well as several thousand other bales of hemp which had arrived on the steamers *Union* and *San Nicholas*, and that other bales were included in the recount which were lying alongside in cascoes and lighters. these facts being evidenced by the books of the firm, authentic documents, and the testimony of credible witnesses. The total amount of hemp included in the recount was 20,414 bales, including the bales deposited and those pledged to other creditors.

So that it is beyond question that on September 10, 1900, the 20,000 bales of hemp pledged to the Compañía General de Tabacos as free from all encumbrance were not in the warehouse at No. 48 Isla de Romero street, and that consequently when Mendezona so stated in the instrument of September 10, 1900, he made a false assertion, and pretended the existence of 20,000 bales, thereby deceiving the creditor corporation, and, by this abuse of the confidence reposed in him, defrauding the said corporation.

If the manager, Señor Correa, had demanded recount of the bales at the time of the pledge of the 20,000 bales of hemp so agreed
14 upon by the instrument of September 10 before the delivery of the keys and it had been discovered that there was no such number of bales in the Isla de Romero warehouse, but much less, and that part of the hemp stored there was the property of others, and that the greater part was pledged to two banks as security for large loans advanced, he would have been within his rights in demanding the completion of the number of bales agreed upon, or to suspend the delivery of the rest of the agreed credit to the debtor, which amounted to the considerable sum of $124,704.89.

The manager of the Tabacalera Company, trusting to the security agreed upon in the instrument of September 10, and the apparent good faith of the accused, continued to advance the latter money and goods from the 11th to the 20th of that month on account of the credit of 300,000 pesos, up to the sum of $296,211.41. Therefore the amount obtained by the *estafa* must be at least the sum mentioned of $124,704.89, the sum total of the cash and goods *delivered to Mendezona in consideration of the false security fraudulently offered* by means of the instrument referred to, admitting that more than one-half of the credit, to wit, the sum of $171,506.52, had been advanced up to the 5th of September without security, and before the agreement to pledge the 20,000 bales of hemp referred to.

The best evidence that the accused has committed the crime of *estafa* is the demonstration of the concurrence in the consummation of the crime of the deceit by which he proposed to commit the fraud and the damage suffered by the defrauded corporation. These two elements are indispensable for the existence of the crime of *estafa*, and in support of our assertion we refer to the doctrine established by the decisions of the supreme court of Spain, which are controlling, as they refer to the interpretation and application of the code now in force, which is of Spanish origin.

The judgment of January 8, 1884, rendered in cassation, lays down the doctrine that the *estafa* defined in section 1 of article 548 of the Penal Code (535 of the Philippine Code) is composed of two essential elements, to wit, deceit and damage, or the intent to cause it; the former being employed for the purpose of producing the latter as a result. In another decision of November 17, 1886, the court says:

"The essential elements of the crime of *estafa*, as this court has repeatedly held, are the deceit employed for the purpose of defrauding, and the damage thereby occasioned, both of which are requisites essential to the existence of any of the cheats defined and punished in the various articles of section 2, chapter 4, title 13, of Book 2 of the Penal Code (equivalent to the same section, title, and book, without the chapter, of the Philippine Code)." This same doctrine is established in many other judgments of the highest court of Spain.

The deceit, the first element of *estafa*, is manifest. Mendezona, when executing the instrument of pledge of September 10, in bad faith and with criminal intent, induced the manager of the com-

pany, Señor Correa, to believe that he was in the possession, as owner, of the 20,000 bales of hemp, free from all incumbrance, and that in this capacity he pledged them to the creditor as security for the credit of $300,000, it having been discovered some days afterwards that there were only 10,900 bales of hemp in the warehouse at No. 48 Isla de Romero street, and as warehouse receipts showed that this amount included 2,238 bales belonging to third persons, and other authentic documents show that there should have been in that warehouse at lease 11,719 bales of hemp pledged to the Spanish-Filipino bank and the Chartered bank, it can be asserted conclusively that of the 10,900 bales of hemp in the warehouse, part were not the property of Mendezona & Co., and the greater part were already pledged as security for the large claims of the two banks mentioned. Therefore, the existence of the 20,000 bales of hemp pledged to the Tabacalera Company, being imaginary and fictitious, there was undoubtedly deceit in the execution of the instrument and the giving of the pledge.

Did the accused make any attempt to prove, in the course of the trial, that he had 20,000 bales of hemp free from incumbrance in his warehouse in Isla de Romero street on the 10th of September, 1900? No; he did nothing more than to affirm this. Mendezona must have known that the burden was upon him to prove that he actually did have this number of bales of unincumbered hemp, as asserted in a public instrument. The mere assertion of the accused, unsupported by sufficient evidence, is not enough in law to overcome the overwhelming proof made by the prosecution.

The result of the recount stipulated in the instrument of September 26, 1900, although it shows 20,414 bales—a much greater number than that pledged by the instrument of the 10th—is, nevertheless, no evidence that there were 20,000 bales of hemp there on the date of the pledge. The proof does not show that 20,000 bales were substituted for others of equal number, and the proof in the record shows that during the entire operation of the recount of the bales in the warehouses, from the 26th of September to the 2d of October, inclusive, thousands of bales of hemp were taken into the warehouse, and that there were included in that recount several thousand bales more which had been on board two steamers and several other smaller vessels. All this shows that at that time the warehouses did not contain the 20,000 bales pledged, and that Mendezona, when so affirming in the public instrument executed by him, acted in bad faith and knowingly deceived his creditor. The instrument of September 26 and the notarial act of the 27th, with the recount of the hemp, have not served to exculpate Mendezona and demonstrate his innocence, but to show clearly his guilt.

The other element of *estafa*, the damage, was present, because the manager, Señor Correa, being deceived by the concession of an apparent security, permitted Mendezona to continue to draw in money and goods upon the credit opened to him up to the amount of $124,704.89, in addition to the considerable amount already received

by him. This would not have occurred if the accused Mendezona had not executed the instrument of September 10, 1900, pretending to be the owner of 20,000 bales of unincumbered hemp, and pledging this amount by the delivery of the keys of the warehouses, notwithstanding the fact that no such amount of hemp was actually in stock. If the accused had not succeeded in deceiving the manager of the Tabacalera Company and the latter had discovered that Mendezona & Co. did not have 20,000 bales of hemp in the Isla de Romero warehouse on the date mentioned, and was therefore unable to give security for the credit of 300,000 pesos, he would have at once suspended the payments of money and the deliveries of goods effected from the 11th to the 20th of that month, and which amounted to the sum total of $124,704.89, in which amount the capital of the Tabacalera Company was diminished, and the debt of Mendezona's firm would have been limited to $171,506.50.

It appears, then, that the damage suffered by the Tabacalera Company by reason of the fraudulent conduct of Mendezona is demonstrated by the irrefutable logic of numbers. Had it not been for the pledge of the 20,000 bales of hemp which the accused pretended to have in his warehouse, he would not have succeeded in fraudulently obtaining money and goods to the amount of $124,704.89, which sum was not really secured, as believed by the defrauded creditor at the time of the making of the pledge.

Irrefutable proof having demonstrated the existence of the crime of *estafa*, committed by fraudulent means, and to the prejudice of the Compañía General de Tabacos, in the large sum mentioned above, the conclusion follows, from the evidence of the prosecution above related, that the accused, Secundino Mendezona, manager of the firm of Mendezona & Co., is guilty as principal, by direct participation of the crime charged. Notwithstanding his denial and exculpative allegations, the record contains conclusive evidence that when demand was made upon him by the manager of the Tabacalera Company for security for the large credit granted him, and in order that he might continue to draw money and goods from the coffers and storehouses of the company, he pretended to have 20,000 bales of unencumbered hemp in his warehouse at No. 48 Isla de Romero street, and pledged said bales by public writing in legal form under date of September 10, 1900, thus succeeding in obtaining the large sum of $124,704.89, in addition to the considerable amount already received by him.

The defendant, Secundino Mendezona, in his capacity of manager of Mendezona & Co., directed the business of the firm, and he alone made all contracts concerning the purchase and sale of hemp, and its receipt and discharge from the warehouses; he alone it was who borrowed large sums from several creditors, and stipulated all the pledges made in the name of the firm in favor of the various creditors. This fact appears of record. Therefore, he must have known that in his warehouse at No. 48 Isla de Romero street there were 2,238 bales of hemp which belonged

to others, and some 11,719 bales which he had already pledged to two banks, because all this appears from documents signed by him and duly acknowledged. He also it was who sought Señor Correa's authority for the return to their owners of the bales of hemp stored in those warehouses. The record shows that on September 10 those warehouses contained much less than 13,957 bales—only some 10,900, and consequently there could not have been 20,000 there, and the defendant certainly has not proved that there were.

The allegations of the defense with respect to the informality in the manner of keeping the books of the warehouses of the firm in question can not be considered, because if there were any errors in the bookkeeping Mendezona would certainly be chargeable therewith. But the fact is that with the aid of these books they succeeded in drawing a general statement of Mendezona & Co.'s stock of hemp; and the defense, during the trial did not prove in what the errors complained of consisted, or what were the defects in these books. Article 48, section 1, of the Code of Commerce in force provides that the books of merchants are conclusive evidence against their owners, and that no evidence contradictory thereof will be admitted.

The agreements entered into subsequent to the instrument of September 10, 1900, dated September 28, October 7, and December 12, 1900, the waiver made by the representative of the Tabacalera Company, among others, of his rights to the pledge of the 20,000 bales of hemp, the cancellation of the first two instruments of September 10 and 28, 1900, in no way affect or eliminate the characteristic elements of the crime of *estafa* committed at the time of the fraudulent pledge recorded in the original instrument of September 10. The contracts or compromises entered into between the parties for the purpose of determining civil liabilities, produce no effect within the domain of the criminal law, and can not blot out a consummated crime. Moreover, *estafa* is a public offense, to be prosecuted and punished by the government on its own motion, even though complete reparation should have been made for the damage suffered by the party injured. Criminality is not affected by compromise or novation of contract. Such stipulations produce effect only with respect to the civil rights of the parties. Such is the constant doctrine of the supreme court of Spain as laid down by its judgments of June 12, 1882, February 19, 1879, February 15, 1884, and February 9, 1885, and many others which it is not necessary to cite.

Furthermore, article 1813 of the Civil Code provides that a civil action arising from a crime may be compromised, but the public action for the imposition of the legal penalty shall not be extinguished thereby; and article 897 of the Code of Commerce establishes that the fact that a bankruptcy has been declared by a final judgment to be fortuitous is not a bar to a criminal prosecution when from the actions pending concerning agreements between creditors, the acknowledgment of credits, or any other incident *indicia* appear of the commission of acts falling within the sphere of the Penal Code, which acts, at the instance of the department of

public prosecution, will be submitted to the decision of a competent court.

With the exception of crimes of a private character, the repression and punishment of public offenses such as *estafa* is a matter of interest to society and one of public policy. For this reason, in the case in question the agreements and compromises entered into by the instruments of October 7 and December 12, 1900, between the defendant and his creditors, among them the representative of the Tabacalera Company, can not change or affect the essence or character of the crime committed, or the penal action for enforcing the penalty; nor is the penal action extinguished by the waiver of the party injured, and although he may expressly waive his right to an indemnification, nevertheless the department of public prosecution will prosecute the case and maintain the public penal action for the punishment of the delinquent. (See arts. 17, 23, and 133 of the Penal Code; 234, 239, 240 *et seq.* of the Reformed Compilation of 1880, and 100, 106, 107, 108 *et seq.* of the Law of Criminal Procedure of 1882.) The latter two procedural laws are cited as legal doctrines not opposed to the present law of criminal procedure in force.

The representative of the Compañía General de Tabacos was obliged to enter into the agreements recorded in the instruments of October 7 and December 12, 1900, together with other creditors, with the accused because he became convinced that the pledge or security given him by Mendezona was illusory and worthless, a recount of the bales of hemp having showed that part of them were not the property of the debtor firm and that the greater part were already encumbered or pledged in favor of other creditors.

In consequence of the agreements before referred to, this court can not enter any judgment with respect to the indemnification of the amount obtained by the estafa in favor of the injured party, because although there has been no waiver of the right to demand a restitution of the $124,704.89 fraudulently obtained, from the context of the instruments executed in October and December it is to be inferred that the manager of the company reserves his right to enforce his claim upon the terms therein stipulated.

This decision, therefore, is limited to the imposition of the adequate penalty prescribed by section 3 of article 534, and in the medium grade, no generic mitigating or aggravating circumstances having concurred in the commission of the crime, as abuse of confidence is inherent in the crime of *estafa*.

Upon these grounds, therefore, we hold (1) that the act which is the object of this prosecution constitutes the crime of *estafa* in an amount superior to 6,250 pesetas, defined and punished by articles 534, paragraph 3, and 535, paragraph 1, of the Penal Code, without the concurrence of any mitigating or aggravating circumstance; (2) that the defendant Mendezona is the sole guilty principal by direct participation; (3) that the defendant is liable to the penalty of *presidio correccional* in its minimum and medium degrees, and to the

accessories prescribed by article 58 of the Code, without right to any reduction of the penalty, he not having been a detention prisoner; and (4) that the court will not make any declaration concerning the indemnification of the amount obtained by the *estafa* in favor of the Tabacalera Company, by reason of the agreements entered into between the latter and other creditors and the accused. The defendant is, however, condemned to the payment of costs.

Therefore the judgment appealed is reversed and Don Secundino Mendezona y Mendezona is convicted and condemned to two years, eleven months, and ten days of *presidio correccional*, with suspension from all public office, profession, trade or right of suffrage, and to the payment of the costs of both instances.

Defendant convicted.

Arellano, C. J., Cooper, J., and Mapa, J., concurring.

McDonough, J., did not hear the arguments and took no part in the decision.

15 That thereafter and on the 5th day of August A. D., 1903, a petition and motion for a new trial and rehearing in said supreme court of the Philippine islands was made by Mr. Frederick Garfield Waite and Don Alfredo Chicote, attorneys for said accused, which said motion and petition is as follows, as translated into English:

"THE UNITED STATES OF AMERICA, *Philippine Islands.*

In the Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
SECUNDINO MENDEZONA, Defendant and Appellee. } Cause No. 1002.

Comes now the defendant and appellee, by Alfredo Chicote y Beltran and Frederick Garfield Waite, his attorneys, and enters a motion for a rehearing and new trial in the above entitled cause in this honorable court, for the following reasons:

First. That on or about the 20th day of July, A. D., 1902, said defendant and appellee was placed upon trial in the above entitled cause, before the Honorable William J. Rohde, one of the judges of the court of first instance of the city of Manila, a court of full and competent jurisdiction, and after trial duly had, was, on the 28th day of July, A. D., 1902, declared and adjudged to be not guilty in the following language: "No considero probado la acusación y absuelvo libremente el acusado."

Second. That thereafter an appeal was duly perfected by the fiscal of said United States, in conjunction with Francisco Ortegas,

Jose Robles Lahesa and Messrs. Davis and Cohn, attorneys for the private prosecutor, La Compania General de Tabacos de Filipinas, to this honorable court.

Third. That under the laws now in force in the Philippine islands, neither the United States nor a private prosecutor
16 are entitled to an appeal in any criminal cause from a decision of not guilty in the court of first instance.

Fourth. That an appeal in a criminal cause taken on behalf of the United States or a private prosecutor is in violation of the organic law of the Philippine islands, to-wit: section 10 of the act of Congress, in effect in the Philippine islands, July 1st., 1902, entitled 'An act temporarily to provide for the administration of the affairs of the civil government in the Philippine islands and for other purposes,' which provides that no person shall twice be placed in jeopardy — punishment for the same offense, and,

Fifth. That such appeal denies to this defendant and appellee the equal protection of the laws guaranteed to him by section 1, amendment XIV of the Constitution of the United States.

(Signed) ALFREDO CHICOTE Y BELTRAN,
FREDERICK GARFIELD WAITE,
Attorneys for Defendant and Appellee."

That thereafter and on the 9th day of August A. D., 1903, in said entitled cause, said petition and motion for a rehearing was denied by said supreme court, with costs, as shown by the opinion of said court, translated into English, which is as follows:

"UNITED STATES OF AMERICA,
Philippine Islands.

In the Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
SECUNDINO MENDEZONA MENDEZONA, Defendant and Appellee.

On motion for a rehearing.

TORRES, *J.*:

The attorneys for the accused, Secundino Mendezona, ask for a rehearing of the cause in which he was charged with and
17 found guilty of the crime of *estafa*, on the ground that, under the laws in force in these islands, neither the United States nor a private prosecutor has in any case the right to interpose an appeal against a judgment of acquittal rendered by a judge of the court of first instance. It is contended that such an appeal would be in violation of the organic act of the archipelago which declares that no person shall twice be placed in jeopardy for the same offense;

and it is further alleged that the appeal in question denies to the accused the equitable protection of the laws guaranteed him by the Constitution of the United States.

Apart from the question as to whether or not an appeal can be taken against a judgment of acquittal rendered by a judge of the court of first instance—this question not having been raised or argued either in the first instance or in this court, during the perfection of the appeal allowed the attorney-general from the judgment of acquittal rendered by Judge Rohde—the contention of the accused, together with the principles on which that contention rests, has already been finally passed upon in the case of The United States *vs.* Kepner (1 Off. Gaz., 353), in which a petition similar to that in the present case and based upon identically the same principles was presented.

The motion is denied, with costs.

S'g'd: Arellano, C. J., Cooper, J., Willard, J., Mapa, J., and McDonough, J., concurring."

To which ruling and judgment of said court, an exception was duly entered by said defendant.

That thereafter and on the 11th day of August, 1903, said judgment against the accused was duly recorded in the said supreme court of the Philippine islands, to which record and entry of said judgment, an exception was duly entered on said August 11th, 1903.

18 That thereafter and on the 11th day of August, A. D. 1903, a petition for a writ of error to the Supreme Court of the United States and for a supersedeas was filed in said court by said defendant Secundino Mendezona Mendezona through Frederick Garfield Waite and Alfredo Chicote y Beltran, his attorneys, which said petition is as follows:

"UNITED STATES OF AMERICA, }
Philippine Islands. }

In the Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
SECUNDINO MENDEZONA, Defendant and Appellee. } Cause No. 1002.

Petition for Writ of Error and Supersedeas.

Secundino Mendezona, the defendant and appellee in the above entitled cause, feeling himself aggrieved by the verdict of this honorable court and the judgment in this case rendered on the 25th day of July, 1903, and by the decree entered in this cause on the 11th

day of August, 1903, comes now by Frederick Garfield Waite and Alfredo Chicote y Beltran, his attorneys, and petitions this court for an order allowing this defendant to prosecute a writ of error to the honorable the Supreme Court of the United States, under and in accordance with the laws of the United States in that behalf made and provided, and in accordance with the provisions of an act of Congress of the United States, entitled "An act temporarily providing for the administration of the affairs of civil government in the Philippine islands and for other purposes," in effect July first, 1902; and also that an order be made fixing the amount of the security which defendant shall give pending said writ of error; and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

19 (Signed) ALFREDO CHICOTE Y BELTRAN,
FREDERICK GARFIELD WAITE,
Attorneys for Defendant and Appellee."

That thereafter and on said 11th day of August, 1903, an assignment of errors was duly filed in said supreme court by the said Secundino Mendezona, through his attorneys Frederick Garfield Waite and Alfredo Chicote y Beltran, which said assignment of errors is as follows:

"UNITED STATES OF AMERICA, }
Philippine Islands. }

In the Supreme Court of the Philippine Islands.

THE UNITED STATES OF AMERICA, Plaintiff and Appellant,
vs.
SECUNDINO MENDEZONA, Defendant and Appellee.
} Assignment of Error-.

Comes now the defendant and appellee by Frederick Garfield Waite and Alfredo Chicote y Beltran, his attorneys, and assigns the following assignments of error which he says occurred upon the hearing of said cause and upon which he will rely upon his prosecution of the writ of error in the above entitled cause.

1. That this honorable court erred in assuming jurisdiction of this cause and rendering judgment therein for the reason that, as shown by the record in the cause, on the 28th day of July, 1902, after a full and complete trial in this cause before the Honorable William J. Rohde, one of the judges of the court of first instance of the city of Manila, a court of competent jurisdiction, said defendant and appellee was completely absolved, declared not guilty and discharged from custody for the same offense with which he stands

charged and of which he has been found guilty by this honorable court.

2. That this honorable court erred in denying a motion for a rehearing filed in this cause and in rendering their decision
20 therein of date August 9th, 1903.

3. That this honorable court erred in assuming jurisdiction in this cause and rendering any decision of any character therein after a finding of not guilty, and a judgment of acquittal in this cause rendered by said court of first instance of the city of Manila, for the reason that under general order No. 58, office of the United States military governor, series of 1900, the United States is not entitled to an appeal from a finding of not guilty and a judgment of acquittal upon a valid complaint rendered by a court of competent jurisdiction.

4. That this honorable court erred in assuming jurisdiction in this cause and rendering any decision of any character therein after a finding of not guilty and a judgment of acquittal in this cause rendered by said court of first instance of the city of Manila, for the reason that such appeal is prohibited by and is contrary to the provisions of the Constitution of the United States, amendment V, which provides that no person shall " be subject for the same offense to be placed twice in jeopardy of life or limb."

5. That this honorable court erred in assuming jurisdiction in this cause and rendering any decision of any character therein after a finding of not guilty and a judgment of acquittal in this cause rendered by said court of first instance of the city of Manila, for the reason that such appeal is prohibited by and is contrary to the provisions of an act of Congress of the United States, entitled "An act temporarily to provide for the administration of the affairs of the civil government in the Philippine islands, and for other purposes."

6. That this honorable court erred in assuming jurisdiction in this cause and rendering any decision of any character therein after a finding of not guilty and a judgment of acquittal in this cause rendered by said court of first instance of the city of Manila, for the reason that such appeal is prohibited by and is contrary
21 to the provisions of act numbered 136, of the United States Philippine Commission, entitled "An act providing for the organization of courts in the Philippine islands."

Wherefore, the said Secundino Mendezona, defendant and appellee in this cause, prays that the judgment of the supreme court of the Philippine islands be reversed and said cause against him be dismissed and that he go hence without delay.

(S'g'd) ALFREDO CHICOTE Y BELTRAN,
FREDERICK GARFIELD WAITE,
Attorneys for Secundino Mendezona,
Defendant and Appellee."

That thereafter and on the 20th day of August, A. D. 1903, said petition for a writ of error to the Supreme Court of the United States was granted by the supreme court of the Phillippine islands, and the amount of the supersedeas bond was fixed at $25,000, United States currency, as appears by the order of said court, of which a true copy is as follows:

"In the Supreme Court of the United States.

SECUNDINO MENDEZONA AND MENDEZONA, Plaintiff in Error,
vs.
THE UNITED STATES, Defendant in Error. } Writ of Error.

UNITED STATES OF AMERICA, *Philippine Islands*, } *ss*:

The President of the United States of America to the judges of the supreme court of the Philippine islands, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in the said supreme court of the Philippine islands, before you or some of you, between the *United States of America*, plaintiff and appellant, *against Secundino Mendezona y*
22 *Mendezona*, defendant and appellee, a manifest error hath happened, to the great damage of the said Secundino Mendezona Mendezona, as is said and appears by *their* petition for writ of error, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the 20th day of October next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 20th day of August, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

(S'g'd) F. C. FISHER,
Clerk of the Supreme Court of the Philippine Islands."

"The foregoing writ is allowed, and upon the filing in the office of the clerk of this court, by said plaintiff in error, of a bond in the

sum of twenty-five thousand dollars ($25,000) approved by me it is ordered that said writ of error shall operate as a supersed-as and stay of execution.

Dated Manila, P. I., August 20, 1903.

(Signed) C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands."

23 That thereafter and on the 21st day of August, A. D. 1903, a supersedeas bond in said sum of twenty-five thousand dollars ($25,000.00), United States currency, was presented by said defendant, Secundino Mendezona Mendezona, which said bond was, on the 24th day of August, A. D. 1903, duly approved by the Honorable Cayetano Arellano, chief justice of the supreme court of the Philippine islands.

That thereafter and on the 20th day of August A. D., 1903, a citation was duly issued by said supreme court, a true copy of which, translated into English is as follows:

"UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

SECUNDINO MENDEZONA, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Cause No. 1002. Citation.

UNITED STATES OF AMERICA,
Philippine Islands, } *ss:*

By the Honorable C. S. Arellano, chief justice of the supreme court of the Philippine islands.

To Lebbeus R. Wilfley, Esquire, attorney general of the Philippine islands, attorney for the United States, and to the United States of America, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol, in the city of Washington in the District of Columbia, on the 20th day of October, A. D., 1903, pursuant to a writ of error filed in the clerk's office of the supreme court of the Philippine islands, wherein Secundino Mendezona is plaintiff in error and The United States of America is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand and the seal of the supreme court
24 of the Philippine islands, at the city of Manila, this 20th day
day of August, in the year of our Lord one thousand nine hundred and three, and of the Independence of the United States the one hundred and twenty-eighth.

(S'g'd) C. S. ARELLANO,
Chief Justice of the Supreme Court of the Philippine Islands."

I hereby accept service of a copy of the above citation this 24th day of August A. D. 1903.

LEBBEUS R. WILFLEY,
Attorney General for the Philippine Islands.

25 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

SECUNDINO MENDEZONA, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Stipulation.

Whereas the record in the above entitled cause in both the court of first instance on the city of Manila, and in the supreme court of the Philippine islands, is in the Spanish language in conformity with law, and is of great length, and,

Whereas, it is essential and necessary that said record should be translated into the English language, or such parts thereof at least as may be pertinent and necessary for the full and just presentation of the points at issue in this cause to the Honorable Supreme Court of the United States,

Now, therefore, it is hereby stipulated and agreed by and between said Secundino Mendezona, plaintiff in error, by Frederick Garfield Waite, his attorney, and The United States of America, defendant in error, by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands, attorney for said defendant in error, that the time for the translation and compilation of the record in this cause and for the transmission thereof by the clerk of the supreme court of the Philippine islands to the clerk of the Supreme Court of the United States, may be and is hereby extended from this date up to and until the 23rd day of December, A. D., 1903, and that said defendant in error be entitled to have and does have the period of sixty days from and after said 23rd day of December, A. D., 1903, and up to and until the 23rd day of February, A. D., 1904, for its entry of appearance in said above entitled cause in conformity with law.

26 In witness whereof said above named parties have hereunto set their hands this 24th day of September, A. D., 1903.

FREDERICK GARFIELD WAITE,
Attorney for Plaintiff in Error.
LEBBEUS R. WILFLEY,
Attorney for Defendant in Error.

Filed in the clerk's office of the supreme court of the Philippine islands this 21 day of Dece. 1903 5.47 p. m.

F. C. FISHER, *Clerk*,
By H. D. McGEORGE, *Deputy*.

27 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

SECUNDINO MENDEZONA, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Stipulation.

Whereas the record in the above entitled cause, both in the court of first instance of the city of Manila and the supreme court of the Philippine islands, is in the Spanish language and of great length, and,

Whereas, in the judgment of the parties to this cause, only certain portions of said records are essential and necessary to be transmitted by the clerk of the supreme court of the Philippine islands to the clerk of the Supreme Court of the United States, in order that the said Supreme Court of the United States may justly and truly determine the points raised by the writ of error and assignments of error in this cause, and,

Whereas the above record in this cause, consisting of 26 typewritten and printed pages, has been compiled by the clerk of the supreme court of the Philippine islands, in conformity with the agreement of the parties hereto taking out and excerpting from said record only such parts thereof as are in the judgment of the parties hereto essential and necessary for the just determination of this cause by the Supreme Court of the United States, and such record above referred to and so compiled and excerpted has, by the clerk of the supreme court of the Philippine islands, been duly translated from the Spanish language to the English language,

Now, therefore, it is hereby stipulated and agreed by and between the parties hereto, Secundino Mendezona, plaintiff in error, by Frederick Garfield Waite, his attorney, and The United States of
28 America, defendant in error, by the Honorable Lebbeus R. Wilfley, attorney general of the Philippine islands, attorney for said defendant in error, that the above record, consisting of 26

typewritten and printed pages shall be and hereby is settled and agreed upon between the parties to this cause as the true and correct record to be transmitted by the clerk of the supreme court of the Philippine islands to the clerk of the Supreme Court of the United States and that said above described record is and shall constitute the full and complete record in the above entitled cause to be presented in said cause to the Supreme Court of the United States for its adjudication and final action.

In witness whereof the said parties above named have hereunto set their hands at the city of Manila, Philippine islands, this 19th day of December A. D., 1903.

FREDERICK GARFIELD WAITE,
Attorney for Plaintiff in Error.
LEBBEUS R. WILFLEY,
Attorney for Defendant in Error.

Filed in the clerk's office of the supreme court of the Philippine islands this 22 day of Dec. 1903. 8.56 a. m.

F. C. FISHER, *Clerk*,
By H. D. McGEORGE, *Deputy*.

29 THE UNITED STATES OF AMERICA:

In the Supreme Court of the United States.

SECUNDINO MENDEZONA, Plaintiff in Error,
vs.
THE UNITED STATES OF AMERICA, Defendant in Error. } Certificate.

THE UNITED STATES OF AMERICA,
Philippine Islands, } *ss*:

I hereby certify that the above record and stipulations thereto attached, consisting of 28 typewritten and printed pages, is a true and correct record of the proceedings had in the court of first instance of the city of Manila, Philippine islands and the supreme court of the Philippine islands in the above entitled cause as agreed upon between the parties to said cause, and that the same was compiled by me in conformity with the expressed desire and instructions of the parties to said cause, acting through their respective counsel, and,

That I am thoroughly conversant with both the Spanish and English languages, and that the translations of all the documents contained in said record were made by me or carefully revised and corrected by me, and that the same are a true and correct translation from Spanish into English of the respective documents therein referred to and that said precedent record is a true and correct

translated record of all of the proceedings in said cause in so far as such proceedings are included in said record under the instructions of the legal representatives of the parties to said cause.

In witness whereof I have hereunto set my hand, and cause to be affixed hereto the seal of the supreme court of the Philippine islands, this 21st day of December, A. D., 1903.

[Seal Corte Suprema Islas Filipinas.]

F. C. FISHER,
Clerk of the Supreme Court of the Philippine Islands.

Endorsed on cover: File No. 19,235. Philippine islands, supreme court. Term No. 584. Secundino Mendezona y Mendezona, plaintiff in error, *vs.* The United States. Filed February 11", 1904. File No. 19,235.

In the Supreme Court of the United States

OCTOBER TERM, 1906.

FRED L. DOBE AND EDWARD F. O'BRIEN, plaintiffs in error, v. THE UNITED STATES. } No. 503.

SECUNDINO MIRANDONA Y MIRANDONA, plaintiff in error, v. THE UNITED STATES. } No. 504.

MOTION TO ADVANCE.

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

FRED L. DORR AND EDWARD F. O'BRIEN, plaintiffs in error, *v.* THE UNITED STATES. } No. 583.

SECUNDINO MENDAZONA Y MENDAZONA, plaintiff in error, *v.* THE UNITED STATES. } No. 584.

MOTION TO ADVANCE.

Comes now the Solicitor-General, on behalf of the United States, and moves the court to advance the above-entitled cases on the docket for hearing during the present term.

It is requested that these cases be heard immediately after the case of *Thomas E. Kepner* v. *The United States*, No. 244, for the following reasons:

First. Because two of the three questions raised in the cases against Dorr and O'Brien and Mendazona are raised in the Kepner case.

Second. Because the issues involve important constitutional questions and affect the entire administration of justice in its criminal branch in the Philippine Islands.

The two issues raised in the case of *The United States* v. *Kepner* are:

(*a*) Does the right of trial by jury exist in the Philippine Islands, notwithstanding the fact that it was not extended to those islands by the Philippine government act of July 1, 1902?

(*b*) Does the provision of the Philippine government act of July 1, 1902, that no person shall twice, for the same offense, be put in jeopardy of punishment, repeal the law of the Philippine Islands which gives the government the right of appeal from judgments of acquittal in criminal cases? In other words, does the procedure in the Philippine Islands, under which the hearing in the court of first instance and the appeal before the Supreme Court are but a part of one continuous trial, violate the act of Congress providing against double jeopardy?

This latter question is the sole issue raised in the Mendazona case. In the Dorr and O'Brien case the jury trial question is raised and, in addition thereto, plaintiffs in error will ask the court to review the case on its merits. The plaintiffs in error were charged with publishing a criminal libel against one of the members of the Philippine Commission, and the sole question raised in the case

was whether or not the publication complained of was libelous under the law.

Thus it is seen that all the issues raised in these cases, with one exception, are contained in the Kepner case, so that a single hearing will practically dispose of the three cases. A mere statement of the issues discloses the fact that practically all the criminal cases now pending and which may hereafter arise in the Philippine Islands will be affected by the decision of the court thereon.

Under the law as it now stands in the Philippine Islands it is the custom in all cases where the accused is able to employ an American lawyer to ask for a jury trial, with a view to laying a foundation for an appeal to the Supreme Court of the United States in the event of conviction. On the other hand, in cases of acquittal the Government is interested in appealing a large number of the cases to the supreme court of the islands. It is thus evident that the government of the Philippine Islands is vitally interested in knowing whether or not it has the right of appeal from judgments of trial courts in criminal cases under the provisions of the act of Congress of July 1, 1902, and in having the question whether the right of trial by jury exists in the Philippine Islands definitely and finally determined by this court. Until this is done the administration of criminal justice in the Philippine Islands is practically suspended.

As the same counsel do not represent the plaintiffs in error in these cases and the Kepner case, I am unable to say whether all would consent to the cases being heard together as one case. Probably this can be done, but so far at least as the Government is concerned the time of one case for the hearing of the three will be sufficient.

Notice of this motion has been served upon counsel for the plaintiffs in error, and it is understood that they concur therein.

HENRY M. HOYT,
Solicitor-General.
LEBBEUS R. WILFLEY,
Attorney-General, Philippine Islands.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

FRED L. DORR AND EDWARD F. O'BRIEN, plaintiffs in error, v. THE UNITED STATES. } No. 583.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

This is a libel suit brought at the instance of Don Benito Legarda, a member of the United States Philippine Commission, against Fred L. Dorr and Edward F. O'Brien, proprietor and editor respectively of the Manila Freedom, a daily newspaper which was, until recently, published and circulated in the city of Manila, Philippine Islands.

This suit grew out of an episode in the trial of another libel suit in which said Benito Legarda was the prosecuting witness and Vicente G. Valdés, editor of a Spanish newspaper published in the city of Manila, known as the "Miau," was

the defendant. Valdés was represented by the firm of Montagne & Dominguez, who had associated with them an elderly gentleman named Edwin H. Lamme, who, at one time, had practiced law in the United States, but who had not been able to gain admission to the bar of the Philippine Island.

This prosecution, and another similar one in which a commissioner also was involved, called forth loud and vigorous criticism from the American newspapers in Manila and from the American portion of the community generally, because according to the old Spanish law, under which Valdés was being prosecuted, the truth could not be offered as a defense in a prosecution for libel. This law was well known to counsel for Valdés, to Mr. Lamme, to the Hon. Arthur F. Odlin, the presiding judge, and to plaintiffs in error.

Notwithstanding his knowledge of this law, Mr. Lamme arose in court during the progress of the trial and asked to be permitted to read what he termed an "offer to prove," in which he stated that he stood ready to prove all the allegations with reference to said Legarda which had been published in the "Miau." This was objected to by counsel for the prosecution, but the objection was overruled, and Mr. Lamme was allowed by the court to publish the damaging statements complained of by reading them in open court and by handing copies of them to the clerk of the court and to the representatives of the press. The

statement had been carefully prepared, committed to writing, and translated into Spanish. Apparently it was injected into the trial of the case for the sole purpose of enabling the newspapers to publish it and claim immunity from prosecution for such publication on the ground that it was privileged.

The plaintiffs in error, who had criticised the Spanish law rule making truth no defense in a prosecution for libel, and who were known to be opposed to the prosecution of Valdés under such a law, eagerly seized the opportunity to republish the libel for which Valdés was being prosecuted, and gave great prominence to it by publishing it under sensational headlines which were set out in large, black-faced display type, extending across half the front page of the paper. The form in which Mr. Lamme had restated the original publication, in his so-called "offer to prove," was much more elaborate and more damaging in every respect than the original libel.

The headlines and the article in full are as follows:

TRAITOR, SEDUCER, AND PERJURER.

SENSATIONAL ALLEGATIONS AGAINST COMMISSIONER LEGARDA.

MADE OF RECORD AND READ IN ENGLISH—SPANISH READING WAIVED.

Wife would have killed him.

Legarda pale and nervous.

The Legarda-Valdez libel case was called in the court of first instance yesterday

morning at 9 o'clock, pursuant to adjournment the day before.

As some of the testimony presented by the prosecution had alleged that Senor Valdez spoke English and knew that Senor Fergusson had introduced him to Commissioner Moses as the editor of "Miau," Attorney Dominguez went on the stand as a witness for the defense. He stated to the court that though he was Senor Valdez's attorney he was not aware that his client spoke more than a few words of the English language. He said that if he was introduced to a man, he knew from the gestures made that he was being introduced and could acknowledge it. Sheriff Peterson also was a witness for the defense along the same lines. His testimony corroborated that of Mr. Dominguez. A recess of a few minutes was then declared while Commissioner Legarda, who had been sent for, appeared in the court room.

When Senor Legarda finally appeared, he took his seat alongside his counsel, Attorney Calderon. He was somewhat pale and appeared slightly nervous. He went to the stand and took his seat in the witness chair. Judge Lamme, for the defense, then arose to interrogate him. The first question asked was:

Q. What is your name?

A. Benito Legarda.

Q. Where do you live?

A. 195 Calle San Sebastian.

Q. Where were you residing in March and April, 1898?

The prosecution at once put in an objection to the question, which objection was upheld by his honor. Judge Lamme then changed the question somewhat, and asked:

Q. Were you a commissioner during August and September, 1901?

A. Yes; from September the first.

Q. Where did you reside during March and April, 1898?

The prosecution again objected to the question. His honor asked Judge Lamme if he desired to argue the question. Judge Lamme explained that he did not; that he was only leading up to what he desired to get at; that he fully agreed with the judge in his ruling the question out.

Q. Do you know anything of the government known as the Malolos government? was the next question asked.

Again this question was objected to by the prosecution. Judge Lamme then stated that he only wanted to have the questions appear on the records of the court; that the defendant could, and was willing to prove the charge made against the prosecuting witness. He stated that he had drawn up a list of the allegations which were contained in "Miau," and with the court's permission would read them. The prosecution objected, as they were in the English language. Judge Lamme then stated that Mr. Montagne also had a duplicate set of the allegations, written in Spanish, which he would read for

the benefit of the prosecution after he, Judge Lamme, had finished those in English. Judge Odlin gave his consent, and the following was read:

The defendant, not admitting that he was either the author, publisher, printer, or proprietor of the paper in which the article complained of was published, now offers to prove and show the truth of all the allegations set forth in said article, and more particularly the following facts:

1. That Benito Legarda, the complaining witness, is a native of the Philippine Islands.

2. That the said Legarda was, at the time of the publication of said article, and still is, a member of the United States Philippine Commission, one of the highest, most important, and responsible positions in the Government of the United States in the Philippine Islands.

3. That at the time of the marriage of said Legarda his wife was a widow and the mother of a daughter of about — years of age, named Dona Teresa Tuason; that said Dona Teresa was taken into the family of said Legarda, as a member of such family, and said Legarda in all things owed to her the same care and protection as to one of his own children, but that when the said Dona Teresa arrived at the age of about 20 years, the said Legarda seduced the said Dona Teresa, and upon the facts becoming known to his wife, she, the said wife, became so enraged at the lewd, lascivious, and

licentious conduct of her husband, the said Legarda, that she made a desperate but futile attempt upon his life.

4. That at about the time of the outbreak of war between the United States and Spain the said Legarda made loud and boisterous protestations of his loyalty to the Spanish Government and joined and became an officer of a company of volunteer soldiers, and as such an officer took an oath of allegiance to the Spanish Government, whereby he solemnly swore to protect and defend the said Government against all its enemies, foreign and domestic. That afterwards the said Legarda deserted the said volunteers and joined the insurgents, the enemies of Spain, thereby, on account of said oath of allegiance, adding the crime of perjury to the dual crime of treason and treachery.

5. That there was a government organized at Malolos in opposition to the duly constituted authorities of the Philippine Islands and said Legarda fled to Malolos, the capital of the said government; but the conservative influence of MacArthur's guns calmed his martial spirit, and he abandoned the sword and became a financier instead of a cavalier.

6. That the said Legarda became the secretary of finance of the said Malolos government, in opposition to the duly constituted authorities of said Philippine Islands, and became a prominent, active, and malignant enemy of the United States.

7. That the advance of the American arms having shown that America would be successful in the conflict, thereupon the said Legarda, instead of remaining loyal to the Malolos government, fled to the American lines and performed such acts of treachery while acting in the official position above mentioned as to procure a sentence of condemnation by the said Malolos government upon him for treason.

8. That the said Legarda voluntarily took the oath of allegiance to three separate, distinct and hostile governments within the period of eighteen months, and each of which governments, at the time of his taking said oath, was at open war with the other; and that the said Legarda violated two of such oaths within a period of eight months, and in each instance fled direct to the armed enemy of the government to which he had formerly sworn allegiance.

9. That the said publication of the article complained of was made in the public press of the city of Manila, not maliciously, but for the sole and only purpose of showing to the people of the Philippine Islands and of the United States the character of said Legarda and his total unfitness for the official position he was then, and is now, occupying.

As the reading was about finished Attorney Calderon again entered a protest. However, the reading of the paper was finished. Mr. Montagne then arose and was preparing to read the Spanish transla-

tion when the prosecution announced that they waived the reading of the Spanish. Both papers were made part of the records of the case.

His honor asked if all the testimony was in. Both sides answered in the affirmative. Next Friday afternoon at 3:00 o'clock was the time set for arguing the case.

On May 23, 1902, suit was brought against plaintiffs in error, on the headlines only. The complaint was as follows:

> The undersigned accuses Fred L. Dorr and Ed. F. O'Brien of the crime of libel, committed as follows: That on the 16th day of April, 1902, in the city of Manila, the said Fred L. Dorr and Ed. F. O'Brien, pretending to make a report of the proceedings had in a trial pending before this court, in which Don Benito Legarda was plaintiff and Don Vicente G. Valdes was defendant, the said Don Benito Legarda having testified as a witness therein, willfully and maliciously and with intent to injure the said Don Benito Legarda, published with respect to the said Don Benito Legarda, in the English language, a false and malicious libel, which libel is of the following tenor:
>
> "Traitor, Seducer, and Perjurer."
>
> Sensational allegations against Commissioner Legarda.
>
> Made of record and read in English—Spanish reading waived.
>
> "Wife would have killed him."

Thereby meaning and giving to understand that the said Don Benito Legarda was a traitor, seducer, and perjurer, and that he had committed the crimes of seduction, treason, and perjury, and that therefore his wife desired to kill him; and below the said libelous publication appears the following:

"Legarda pale and nervous."

Thereby meaning that he became so in consequence of the truth of the accusations referred to, it being the purpose of the accused to thus give an appearance of probability to the said libel, against the statute in the case made and provided.

(Signed) DIONISIO CHANCO,
Assistant Prosecuting Attorney.

The case went to trial on August 25, 1902. It is proper to say in this connection that the Philippine Commission, as soon as the defects in the Spanish libel law were called to its attention, passed act No. 277, incorporating into the law of the Philippines the principles of the law of libel as they are found in most of the States of the Union. It repealed the Spanish law making truth no defense. *So, whilst Valdez was tried under the old Spanish law, plantiffs in error were prosecuted under said act of the Commission and were given ample opportunity to prove the truth of the statements contained in the publication complained of.* After a fair and impartial trial, they were found guilty and sentenced to six months' imprisonment at

hard labor, and to pay a fine of $1,000 United States currency. The supreme court of the islands, on appeal, affirmed the judgment of the lower court. The case is here on writ of error. Plaintiffs in error set out five assignments of error, which we think may be fairly stated in three propositions:

First. That the court erred in holding that said headlines or caption declared upon were not a legitimate deduction from a privileged publication of an exact and truthful account of a public judicial proceeding in a court of record;

Second. That the court erred in holding that these defendants were not entitled to a trial by an impartial jury, as provided in Article III, section 2, Amendment VI of the Constitution of the United States;

Third. That the court erred in holding that act No. 277, passed by the United States Philippine Commission (known as the libel law), is a valid law passed by competent legislative authority.

The above propositions are stated in the order of their importance and not as they appear in the assignment of errors. We shall discuss them in the above order.

FIRST ASSIGNMENT OF ERROR.

The single question raised here is: Were the headlines in question privileged?

There was no evidence introduced at the trial which showed, or tended to show, that the statements contained in the headlines were true. The trial court, in sentencing the plaintiffs in error, used the following language:

> *In the progress of this cause, not a witness was called or a question asked, nor was any suggestion made by counsel even hinting at the truth of any statements contained in the libelous publications, and I find that every word and every sentence contained in this libelous publication derogatory to Benito Legarda is false and wanton.*

The statements contained in the headlines being untrue, the law presumes malice; hence they constitute a libelous publication.

In view of this fact the only possible defense for plaintiffs in error is the contention that said headlines or caption were a legitimate deduction from a privileged publication of an exact and truthful account of a judicial proceeding in a court of record.

Our answer to this contention is:

I. That the body of the article itself was not privileged;

II. That, granting, for the sake of the argument, that the article was privileged, still plaintiffs in error are liable, because—

(*a*) The publication complained of constituted remarks or comments within the purview of sec. 8 of act No. 277.

(*b*) They were not a fair index to the contents of the article.

(*c*) Their publication was malicious.

I.

THE ARTICLE OVER WHICH THE HEADLINES IN QUESTION APPEARED WAS NOT PRIVILEGED.

It appears, from the language contained in the opinion of the court and in the dissenting opinion, that the judges of the supreme court of the Philippine Islands were of the impression that the Government by basing this prosecution upon the headlines thereby admitted that the body of the article was privileged. We think no such deduction can fairly be made. The Government has never made any such admission. The case was based upon the headlines because, in addition to containing the essence of all the damaging statements found in the article, they were, in respect to form totally, and in respect to substance partly, a product of the editor of the paper, and hence could not be considered privileged as being part of a court proceeding. We do not believe the article itself is entitled to privilege, notwithstanding the fact that the judge allowed the statements to be read in open court and made part of the record. The so-called "offer to prove" was, in reality a harangue, delivered in open court by an interloper,

in a case in which the statements contained therein could have no possible effect in determining the issues under consideration. Mr. Lamme was not a member of the bar and, under the Spanish law then in force in the islands, his very appearance in court as an attorney, without license, was a criminal offense. The "offer" was not in the form of evidence and was not tendered as such. No witness was on the stand; no one had been produced in court who stood ready to testify to the truth of the statements made by Mr. Lamme; the performance was nothing more nor less than the delivery, in a dramatic way, of a stump speech made up of false statements which were irrelevant, immaterial, and in no way connected with the case on trial, and which, even if proven to be true, could not, under the law then in force, have been considered by the court in deciding the case. The author of the statement was not only guilty of a crime by appearing in the case as an attorney when he was not such in the eye of the law, but he was also unquestionably guilty of the crime of uttering and publishing a malicious libel against Benito Legarda. As stated before, the language of the so-called "offer to prove" was far more damaging than the libel published by Valdés in the "Miau," for which he was then being tried, because it contained more specific charges and a palpable attempt at ridicule.

The spectacle thus presented is that of one violating a criminal law, first, by appearing in court

as an attorney, without license, and, second, by uttering a malicious libel in a case where the statements contained therein were irrelevant, immaterial, and, in all respects, extraneous to the issues under consideration.

These facts were known to the plaintiffs in error, who published said article, as well as to the court and to Mr. Lamme.

In view of the foregoing, can it be said that it was possible for the presiding judge who permitted these crimes to be committed in his presence to make the so-called "offer to prove" a part of "judicial proceedings" in a legal sense, by allowing it to be read in court and incorporated into the record?

We do not think this proposition can be maintained. It will be observed in this case that the utterance complained of was *wholly foreign* to the cause under consideration. For this reason it was libelous and subjected the author of it to criminal prosecution. The rule in England is that judges, parties, counsel, and witnesses, are absolutely exempted from liability to an action for defamatory words uttered in the course of judicial proceedings. In the United States this doctrine is qualified by requiring the statements made in the course of the trial to be *pertinent and material to the case*. This qualification of the English rule is adopted in order that the protection given to individuals in the interest of an efficient administration of justice

may not be used as a cloak from beneath which to gratify private malice.

In the case of *Stackpole* v. *Hennen* (17 Am. Dec., 187), counsel was accused of using the following language in putting certain questions to witness: "I wish to show that the witness is perjured, and that he came here to perjure himself."

The court held that the language was not privileged, and a judgment for the plaintiff was upheld. In the course of the decision it was stated:

> The proposition that any class of men, under the pretense of aiding in the administration of justice, could say what they pleased of every individual who was a witness or party, without incurring responsibility, is too revolting to require refutation. Equally unfounded do we believe a ground assumed in the defense of the present case, that counsel is not responsible even for speaking maliciously, if the matter was spoken during the trial and relative to the cause in hand.

The rule is well settled in the United States that irrelevant and impertinent statements, made in the progress of a trial, render the author of them liable to a criminal prosecution. If the statements had any bearing upon the question before the court, and the question of the admissibility of the testimony was one susceptible of discussion, then the ruling of the court would be final in determining whether the article was privileged within the meaning of the law. But we do not believe a

purely gratuitous statement in open court, which can have no application to the case on trial, and which is palpably false and damaging, can be brought within the limits of privilege merely by the action of the court in allowing it to be read and made a part of the record.

The crucial question is: *Was the utterance pertinent to the issues under consideration by the court?* It will be observed that, in proceedings in court, statements made by counsel do not become libelous by reason of being false and damaging, but by reason of the fact that they have no bearing upon the case on trial. It is this lack of the element of pertinency which subjects the counsel who utters them to criminal prosecution. Of course, it is the duty of the court to keep out all such matters, but if, through the stupidity, corruption, collusion, inadvertence or mistake of the court, false and damaging statements which are wholly foreign to the subject-matter under consideration get into the record, this does not furnish immunity from prosecution to newspapers who afterwards publish them. If this were not so, there could be no more convenient and effective way of destroying reputations than by injecting into the trial of a case libelous matter, with a view to having it spread broadcast throughout the community by the public press acting under the protection of the privilege afforded by the law.

Generally speaking, statements of counsel, other than questions put to witnesses and objections to

rulings of the court, have no proper place in court records. The court record, strictly speaking, consists of the pleadings, the questions of counsel, the answers of witnesses, objections by counsel, and the rulings and judgment of the court. In no proper or legal sense can the statements of counsel in regard to extraneous matters which have no bearing upon the case at trial be said to form a part of the record of the court.

In *Commonwealth* v. *Godschalk* (13 Phil. (Pa.), 575), the *court held that a speech of counsel in judicial proceedings does not afford matter for a privileged publication, and if it contains scandalous and defamatory matter a prosecution for libel will be maintained.*

It will be said in reply to this that such a rule would work a hardship upon the public press. At first blush this contention would seem to be well founded, but upon closer examination it will be seen that the rule is not an unfair one. When counsel in open court enters upon a policy of uttering defamatory and injurious statements in regard to an individual, the question, under the rule here sought to be established, would immediately arise: Are such statements material to the issue? If wholly extraneous to the subject-matter before the court, the representative of the press is presumed to know that under the law counsel is guilty of uttering a criminal libel, and hence he is immediately put upon notice. In order to make certain that he is safe in publishing the proceedings he

should wait until the court passes upon the pertinency and relevancy of the utterances in question. If the court decides that the utterances naturally grow out of and form a part of the controversy in question, and naturally and properly form a part of the proceedings, then the statements may be reproduced in the press under the privilege that it was court proceedings.

This rule can not possibly work a hardship in the case at bar, because all parties in interest had full knowledge of the law in force and had full knowledge of the fact that the so-called "offer to prove" of Mr. Lamme could not possibly have any bearing upon the determination of the guilt or innocence of Valdés. The truth is, a careful study of the record produces irresistibly the conviction that there was collusion on the part of all the responsible parties connected with this publication.

II.

THE HEADLINES IN QUESTION WERE LIBELOUS, BECAUSE—

(*a*) **They were "remarks or comments" within the meaning of the law;**

(*b*) **They were not a fair "epitome or index" to the article itself;**

(*c*) **Their publication was malicious.**

(a) *The headlines in question were libelous, because they were "remarks or comments" within the meaning of the law.*

The libel law now in force in the Philippine Islands, relating to newspaper accounts of judicial

proceedings, is found in sections 7 and 8 of act No. 277, as follows:

> SEC. 7. No reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceeding, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.
>
> SEC. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected.

The question here raised is: Are the headlines of this article "remarks or comments" within the scope of said section 8?

In some of the States of the Union the publication of headlines in connection with privileged matter does not confer on the headlines themselves any privilege. This is true in New York,[a] and the section above referred to is broader than the New York statute, including as it does "remarks and comments" of every character. The provisions of this section limit the newspapers to the publication of a bare account of court proceedings. Of course they may put headlines to such accounts if

[a] The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any person concerned in the publication, or in the report of anything said or done at the time and place of the public and official proceedings, which was not a part thereof. (Rev. Stats., New York, 2d ed., Vol. II, p. 1875, par. 2.)

they choose, but if, in so doing, they publish defamatory statements, or words which tend to impeach the honesty, virtue, or integrity of an individual, and thereby expose him to public contempt or ridicule, the offense is as complete as if it were a separate and independent publication.

It does not require argument to establish the defamatory character of the headlines in question. It is difficult to conceive of words more damaging than those used in this caption. Are they, within the meaning of the law, "remarks or comments?"

A comment, according to the Century Dictionary, is:

> A spoken or written remark or conversation; a remark or note; especially, a written note intended as a criticism, explanation, or expansion of a passage in a book or other writing; annotation, explanation, exposition.

The Standard Dictionary defines "remark" to be:

> A *comment or saying*, whether oral or written; especially one that is *brief and pertinent and made without much premeditation*.

According to Webster, a comment is:

> A remark, observation, or criticism; gossip, discourse, talk; *a note or observation intended to explain*, illustrate, or criticise *the meaning of a writing*, book, etc. Explanation, annotation, exposition.

The same author defines a remark to be:

> An expression in speech or writing of something remarked or noticed. *The mention of that which is worthy of attention or notice.* A casual observation, comment, or statement.

In order to violate section 8 of the law, it is not necessary that the newspaper shall publish a serious discussion, in the form of an editorial, of what took place at a trial. It is sufficient if a note of explanation or comment, "brief and pertinent and made without much premeditation," is published. There is no doubt that headlines may be used for making comments as well as any other portion of the paper. The use of headlines is, possibly, the most destructive and damaging form of remarks and comments known to the newspaper profession. The art of compressing a great deal into a small compass and stating it in a sensational, pithy, catchy form, in large type, at the head of an article is highly developed in this country. Possibly in no other line in the field of journalism has there been so much progress made in recent years. The tendency is strongly toward sensationalism, the object being, by the use of highly colored, pithy headlines, to catch the attention of the busy public.

Plaintiffs in error contend that these headlines are a mere deduction from the contents of the article, which they claim is privileged. This contention, if true, would be an argument against

their position. Deductions, or inferences, are clearly prohibited by the law. These are stronger terms than "comments" or "remarks." When editors undertake to publish their own deductions or inferences from what took place at a trial, the privilege ceases.

According to Webster, a deduction is:

> That which is deduced, or drawn from, premises by a process of reasoning; inference, acquisition.

If this contention of plaintiffs in error should prevail, it would have the effect of destroying the rule laid down in section 8.

It is held in some States where there is no law with reference to comments and remarks that headlines may be used if they fairly and accurately forecast the article published, but they must be true and faithful epitomes of what is contained in the account of the court proceedings.

In the case of *Lawyers' Cooperative Publishing Co.* v. *West Publishing Co.* (32 N. Y., 585), the court held that—

> Defamatory headlines prefixed to a report of a judicial decision or of judicial proceedings are no part of the report, but are, in effect, comments upon it and are not privileged unless they are a fair index of the matter contained in a truthful report.

In the case of *Hayes* v. *Press Company, Limited* (127 Pa., 642), the suit was brought on the headlines of the following publication:

Hotel proprietors embarrassed.

A judgment was entered yesterday by the Third National Bank against J. F. and W. N. Hayes, of the St. George Hotel, on a promissory note, dated August 6th, and payable on demand, for fifteen hundred dollars.

The court, in holding that the publication was libelous, laid down the following doctrine:

In his answer to the fourth point, above quoted, the learned judge said: "I have defined in my charge how far it is privileged, by telling you that a fair comment was admissible, but that an unfair and reckless comment was not admissible. This would take away the privilege." This answer, we think, was misleading and erroneous. Strictly speaking, the question of privilege was not involved. It was the common right of anyone to publish the fact that a judgment for $1,500 had been entered against the defendants, substantially as shown by the record of the court in which it was entered; but it was neither the right nor the privilege of defendant, or anyone else, to publish in connection therewith the declaration, in the form of a headline, or otherwise, that the defendants in the judgment were embarrassed. That had a direct tendency to impair their credit and injure their business; and if the evidence is believed, it

did injure plaintiff's credit and business as a hotel keeper. Such a declaration, whether it be regarded as an inference drawn by the writer from the fact that the judgment was entered, or be called a comment on a judicial proceeding, was an unwarranted [illegible] tion of fact, which, if untrue, was manifestly calculated to impair plaintiff's credit and injure his business. It does not follow that one who authorizes a confession of judgment against himself is financially embarrassed. The publication, as a whole, including the headline, was in no sense privileged.

(b) *The headlines in question were libelous because they were not a fair "epitome or index" to the article itself.*

The main argument of plaintiffs in error, as we understand it, is based upon the proposition that the headlines in question are a fair index to the article, which is claimed to be an accurate account of what transpired in court. They deny that they are "remarks or comments" in any proper sense.

Assuming, for the sake of the argument, that plaintiffs in error are correct in this and that they had a right to place a fair "index" or "epitome" at the head of the article in the form of headlines, let us examine the language contained in the headlines, in connection with the article itself, for the purpose of ascertaining whether they contain an accurate summary of what took place in court, as stated in the published account.

An examination of the record in this case discloses that, according to the account contained in the Freedom, two events occurred at the trial which stood out prominent above all others.

First. The court ruled out all questions which tended to prove the truth of the allegations contained in the libel;

Second. Mr. Lamme read a statement in which he repeated the language contained in the article published in the "Miau" and stated that he stood ready to prove the same.

The headlines contain an account of only one of these events, namely, the one damaging to Legarda. They make no reference to the first and most important feature, which stood out through the entire trial of the case, that the court, under the law, ruled out all tenders of proof bearing on the truth of the statements contained in the libel. The second fact, that Mr. Lamme made these sensational statements, is brought out with great fulness and care, and in order to make it effective the editor attached a statement which was purely an inference of his own and which had no fact to support it.

A casual reading of these headlines would give the impression that a trial was in progress during which Legarda was charged, under the forms of law, in such a proper and legal manner as to entitle it to be made of record, with being a traitor, a seducer, and a perjurer, and that the result of these charges upon Legarda himself was to make

him pale and nervous. *As a matter of fact, Legarda was not present in court when the allegations were read by Mr. Lamme; hence this portion of the account is not only misleading, but false.* I think we might, in fairness, go further and state that one would naturally get the impression from reading these headlines that a witness had been placed on the stand and had testified to the foregoing statements, because this is the usual, and in fact the only, way in which charges of this kind are made in the progress of a trial and incorporated into the record. If the headlines had indicated that the allegations were merely an "offer to prove" on the part of counsel, and that the court ruled that such proof was inadmissible under the law, the statement would have been fair and accurate.

On pages 27 and 28 of the record will be found questions which indicate that Mr. Lamme undertook to prove facts for the purpose of leading up to prove the truth of the libel. In the opinion of the court, page 35 of the record, will also be found the following language:

> The judge of the court of first instance excluded the proof tendered in the document.

This fact does not appear in the headlines.

Newell on Defamation, Libel, and Slander, pages 556, 557, says:

> The publisher must add nothing of his own. He must not state his opinion of

> the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground—that they are fair and *bona fide* criticism on a matter of public interest, and are therefore not libelous. But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. Lord Campbell said: "If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things—report and comment—should be kept separate." *And all sensational headings to reports should be avoided.*

See also *Andrews* v. *Chapman* (3 C. & K., 288).

Again, on page 559, Newell says:

> But if anything be omitted in the report which could make any appreciable difference in the plaintiff's favor, or anything erroneously inserted which could conceivably tell against him, then it is a question for the jury whether such deviation from absolute accuracy makes the report unfair; and the trial judge will not direct a verdict for either party.

And again, on the same page:

> If, however, there is a substantial misstatement of any material fact, and such

misstatement is prejudicial to the reputation of the plaintiff, then the report is unfair and inaccurate, and the jury will find for the plaintiff.

Our contention is that this caption is unfair and inaccurate, in that it gives an account of only one phase of what occurred at the trial, and that in language highly colored, sensational, and misleading.

The headlines give the impression that the effect of the proceedings in court was altogether damaging to Legarda's case. The truth is, nothing transpired that affected his case at all. The occurrences at the trial were of little consequence, for the reason that everyone present understood that Mr. Lamme's spectacular performance was a mere bluff, because, in the first place, he did not stand ready to prove any of his statements, no witness being present for that purpose; and, in the second place, for the reason that the court had ruled that any such proof, if it actually existed, would not be admitted as evidence.

(c) *The headlines in question were libelous, because they were published with malice.*

The law on this phase of the case is found in section 7 of act No. 277, which provides that fair and truthful reports of judicial proceedings are privileged, "except upon proof of malice in making such report, which shall not be implied from the mere fact of publication."

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If it can be demonstrated that the publication was maliciously made, it will result in eliminating all the foregoing arguments and very much simplify the issues in the case.

The contention of the Government that the headlines in question were published with malice is based upon the following facts:

1. The sensational form and undue prominence given them.

2. They are an unfair and inaccurate index to the contents of the article itself, summarizing, as they do, only those facts contained in the article which are prejudicial to Legarda.

3. They contain a statement in regard to Legarda's attitude at the trial which was not only damaging but absolutely false.

It will be conceded that malice can be shown by the form of the publication, as well as by the substance. A comparatively insignificant occurrence can be swelled into a matter of great importance by an angry editor, through the use of prominent and sensational headlines.

That this trial was a matter of interest to the people of Manila will not be questioned, but it is denied that it was of sufficient importance to warrant the prominence given it in the newspaper by the plaintiffs in error.

The size of the heading, in the first place, is out of all proportion with the importance of the occurrence, and when this is coupled with the fact that all the vicious part of the article was con-

densed into a few words and placed in the most damaging form conceivable, it goes far to show malice. It is certain that it is inconsistent with the spirit of disinterestedness and fair dealing. This presumption is materially strengthened when considered in connection with the fact that the caption was a one-sided and unfair index to the article. This element of unfairness, according to the authorities, is strong evidence of malice. Newell, in his work on libel and slander, page 554, says:

> When a man publishes a portion only, when it is in his power to publish the whole, this fragmentary publication will be evidence of malice, if the part selected and published tell more against the plaintiff than a report of the whole trial would have done.
>
> * * * * *
>
> A condensed report might be published, if prepared faithfully and truthfully, but the suppression of parts of the testimony which would tend to qualify defamatory matter contained in the report would be evidence of malice and would destroy the privilege. (45 Hun. (N. Y.), 120.)

If anything further is needed to demonstrate, beyond peradventure, that the publication was a malicious one, it is found in the fact that the warped, distorted, and partial index was given a still more sensational aspect and a higher coloring by reason of the addition of a statement which was *totally untrue*.

The statement that Legarda was "pale and nervous" in connection with the reading of the so-called "offer to prove" was manifestly made for the purpose of giving the impression that the allegations contained in the libel were true, as evidenced by the effect they had on him when read in open court in his presence. This shows a wanton recklessness in the perversion of facts which argues conclusively the existence of malice. It will be remembered in this connection that in the trial of the case at bar plaintiffs in error had ample opportunity, with Mr. Lamme and Montagne & Dominguez as their counsel, to prove the truth of these allegations which they said they stood ready to prove in the "Miau" prosecution. They had months in which to prepare for the case; they contended all the time that they had proofs of the alleged facts in their possession. The production of these proofs would not only have been admissible, but it was the one thing which would have saved them from the humiliation of conviction and punishment; yet when they were put upon trial for publishing these statements, under a law which permitted the truth to be proved in justification, they did not produce a single witness or lift a finger in the direction of substantiating the charges by the introduction of actual proof. So complete was their failure in this regard as to warrant the court of first instance, in saying, when announcing its judgment:

I find that every word and every sentence contained in this libelous publication derogatory to Benito Legarda is false and wanton.

Let us examine the publication from another point of view. Let us begin by assuming that there was malice.

Suppose that Mr. Lamme and plaintiffs in error had a grievance against Legarda, and the presentation of the so-called "offer to prove" and its subsequent publication were the outcome of collusion between these parties. If the foregoing had been the facts, would it have been possible for the plaintiffs in error, in reproducing the occurrences which took place at the "Miau" prosecution, to have resorted to a publication more destructive in form and character than the one actually used? The sting of the article is put in three of the most destructive and damaging words in the English language, and placed in large display type at the very heading of the article. Had larger type been used, had greater space been covered by the headlines, had they gone further in making the headlines one-sided and prejudiced, had they added further falsehood, the malice would have been palpable to the public and their purpose would thus have been defeated.

Therefore, proceeding upon the assumption that plaintiffs in error were actuated by a spirit of hatred and revenge, they used the words and form best calculated to accomplish their malicious ends.

From whatever standpoint it is viewed, it is impossible to contemplate this proceeding in its entirety, especially when it is considered in the light of subsequent events, without being overwhelmed with the conviction that the conduct of the parties responsible for it was the result of improper motives, and that the publication was libelous because maliciously made.

We submit, therefore, that the cumulative effect of the foregoing facts in establishing malice can not be resisted.

It must be constantly borne in mind, in the consideration of this case, that Mr. Edwin H. Lamme and Montagne & Dominguez, who were the lawyers for Valdés in the "Miau" prosecution before Judge Odlin, were also the lawyers for plaintiffs in error in this prosecution before Judge Ambler; and that while Valdés was tried under the old Spanish law, under which truth was no defense, plaintiffs in error were tried under the new libel law, under which truth is a defense.

SECOND ASSIGNMENT OF ERROR.

Is the right of trial by jury in the Philippines?

The second assignment of error is based upon the proposition that the Constitution of the United States, in its entirety, has been in full force and effect in the Philippine Islands since the date of the ratification of the treaty of Paris, and hence

the provision guaranteeing the right of trial by jury has existed in the islands since that date.

This court has recently held in the so-called Insular Cases that exactly the contrary of the foregoing proposition is the law. It held in those cases that the provisions of the Constitution do not of their own force attach to newly acquired territory immediately upon the date of acquisition; that power to extend the provisions of the Constitution to the territories rests in Congress; that notwithstanding the fact that there are certain prohibitions contained in the Constitution relating to fundamental rights, which go to the very root of the power of Congress to act, at all times, in all places, and under all circumstances, yet there are other limitations contained in that instrument, not absolute in their nature, relating to such matters as methods of procedure and forms of judicial trials, which do not restrict Congress in the exercise of its power to create local governments and make needful rules and regulations for the Territories of the United States.

This position is identical with that taken by Chief Justice Marshall in the case of *American Insurance Co.* v. *Canter* (26 U. S. Rep., 542), and by Mr. Webster, who argued the case before him. In that case it will be observed that the "Great Chief Justice," without devoting any time to the discussion of the question of the source of the power, announced with great clearness and force

that the existence of such authority in Congress could not be questioned.[a]

In view of the foregoing decisions, the only practical question left for determination in cases like the one at bar is: What are those constitutional guarantees which Congress may, in its discretion, extend to or withhold from territory which has not been incorporated into the United States? Fortunately for the determination of this case the court has answered this question in the recent case of *Hawaii* v. *Mankichi*, as follows:

> We would even go further, and say that most, if not all, the privileges and immunities contained in the bill of rights of the

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[a] In the meantime, Florida continues to be a Territory of the United States; governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the Territory, or other property, belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the fact that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned.

* * * * *

These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. (26 U. S. Rep., 542, 543, 546.)

> Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case* are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well-being.

The power of Congress to provide such modes of trial and methods of procedure as, in its judgment, are best adapted to the needs of the people of the territory, is here clearly recognized. Such power was also recognized in the case of Rose, petitioner, 140 U. S., 453.

In the light of these decisions, it must be deemed that the proposition contained in the second assignment of error has been finally adjudicated, and we shall not consume the time of the court with further discussion of it.

THIRD ASSIGNMENT OF ERROR.

Is the Philippine Libel Law Valid?

The contention of plaintiffs in error that act No. 277 of the United States Philippine Commission is not a valid law, because it was not passed by competent legislative authority, is, in our opinion, not entitled to serious consideration.

*Common-law trial by jury and indictment by grand jury.

In passing said act the Commission acted either as a military commission or under the provisions of the so-called "Spooner amendment." If it is held that a state of war existed, there can be no dispute as to the authority of the Commission to pass the law in question, because its power to legislate was unrestricted save by the orders of the Commander in Chief of the Army. On the other hand, if it is held that a state of war did not exist in the Philippine Islands after the treaty of cession, then authority for the passage of the act in question is found in the provisions of the said "Spooner amendment."

The "Spooner amendment" was an act of Congress vesting in such persons as should be appointed by the President of the United States the power to legislate for the Philippine Islands, and providing that the acts and proceedings of such legislative body should be reported to Congress on or before the first day of each regular session. This was a provisional and temporary delegation of legislative power to a commission to be appointed by the President of the United States. There is no doubt about the general proposition of law that a branch of the Federal Government can not delegate its powers. It is also well settled that there are certain exceptions to the general rule. A well-known exception is that of municipal corporations, upon which the powers of legislation are commonly bestowed.

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The case in question forms an exception to the general rule equally well established. Congress, in the exercise of its power to make needful rules and regulations for the Territories, has often delegated its powers to the Territorial governments. The Supreme Court, in the case of *De Lima* v. *Bidwell*, says that the power to establish Territorial government has been too long exercised by Congress and acquiesced in by the Supreme Court to be deemed an unsettled question. (See also *Am. Ins. Co.* v. *Canter*, 1 Peters, 511.)

It is thus seen that there can be no doubt as to the validity of the law on the ground that the Commission did not possess competent legislative authority. Moreover, it will be remembered in this connection that when Congress did pass an act providing for the temporary government of the Philippine Islands, it formally ratified and affirmed the action of the President of the United States in creating the Philippine Commission and in authorizing said Commission to exercise the powers to the extent and in the manner and form in which it did, and ratified by implication all the acts of the Commission up to that date.

CONCLUSION.

We contend, therefore, that the decision of the supreme court of the Philippine Islands in this case should be affirmed, on the following grounds:

First. *That the headlines in question constituted a libelous publication, because*

(*a*) *The body of the article, which purported to be an account of court proceedings, was not privileged; hence no privilege could be claimed for said headlines on the ground that they formed a part of a privileged publication;*

(*b*) *Assuming, for the sake of the argument, that said account of court proceedings was privileged, the headlines complained of are not privileged, for the reason that they constitute "remarks or comments" within the meaning of section 8 of the libel law, which provides that libelous remarks or comments connected with matter privileged receive no privilege by reason of being so connected.*

(*c*) *Said headlines are not a fair index or epitome to the article itself, for the reason that they epitomize only that part of the contents of the article which was prejudicial to Legarda, and for the further reason that they contain a damaging statement which was absolutely false.*

(*d*) *Independently of the question whether the article itself was privileged, or whether*

the headlines were "remarks or comments" within the meaning of section 8 of act No. 277, said headlines were published with malice, as is evidenced by the undue prominence given to them, the damaging form in which they were arranged, the unfair and one-sided synopsis they give of the contents of the article itself, and the false and damaging statements contained therein.

Second. *The right of trial by jury does not exist in the Philippine Islands, because it has never been extended there by act of Congress, which, under the decisions of this court in the cases of Hawaii* v. *Mankichi, Ross, petitioner, American Ins. Co.* v. *Canter, and in the so-called insular cases, is the only authority by which this can be accomplished.*

Third. *That act No. 277, under which this prosecution was instituted, is a valid law, for the reason that it was passed by competent legislative authority, the United States Philippine Commission being a legislative body which operated as a military commission while war existed, and after peace was declared by virtue of authority vested in it by act of Congress, all its acts having received the implied ratification of Congress in the Philippine Government act of July 1, 1902.*

LEBBEUS R. WILFLEY,
Attorney-General for the Philippine Islands.

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Supreme Court of the United States.

No. 583.—October Term, 1903.

Fred. L. Dorr and Edward F. O'Brien, Plaintiffs in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice Day delivered the opinion of the Court.

This case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused and denied by the courts established in the islands.

The recent consideration by this court and the full discussion had in the opinions delivered in the so-called "Insular cases," renders superfluous any attempt to reconsider the constitutional relation of the powers of the government to territory acquired by a treaty cession to the United States. (*De Lima* v. *Bidwell*, 182 U. S. 1; *Downes* v. *Bidwell*, 182 U. S. 244.) The opinions rendered in those cases cover every phase of the question, either legal or historical, and it would be useless to undertake to add to the elaborate consideration of the subject had therein. In the still more recent case of *Hawaii* v. *Mankichi*, (190 U. S. 197,) the right to a jury trial in outlying territory of the United States was under consideration. For the present purpose it is only necessary to state certain conclusions which are deemed to be established by prior adjudications, and are decisive of this case.

It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government. "The Government of the United States was born of the Constitution, and all powers which it enjoys or may exercise must be either derived expressly or by implication from that instrument." (*Downes* v. *Bidwell*, 182 U. S. 244–288, and cases cited.) It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations. This principle has been recognized by this court from its earliest decisions. The convention which framed the Constitution of the

United States, in view of the territory already possessed and the possibility of acquiring more, inserted in that instrument, in article 4, section 3, a grant of express power to Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

As early as the February term, 1810, of this court, in the case of *Sere and Laralde* v. *Pitot and others,* (6 Cranch, 332,) Chief Justice Marshall, delivering the opinion of the court, said:

"The power of governing and legislating for a territory is the inevitable consequence of the right to acquire and hold territory. Could this position be contested, the Constitution of the United States declares that 'Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property of the United States.' Accordingly we find Congress possessing and exercising the absolute and undisputed power of governing and legislating for the Territory of Oregon. Congress has given them a legislative, an executive and a judiciary, with such powers as it has been their will to assign to those departments respectively."

And later, the same eminent judge, delivering the opinion of the court in the leading case upon the subject, (*American Insurance Co.* v. *Canter,* 1 Pet. 511, 542,) says:

"The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.

"The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfers of territory it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly-created power of the State.

"On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: 'The inhabitants of the territories, which His Catholic Majesty cedes the United States by this treaty, shall be incorporated into the United States as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States.'

"This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress 'to make all needful rules and regulations respecting the territory or other property belonging to the United States.'"

While these cases, and others which are cited in the late case of *Downes* v. *Bidwell, supra,* sustain the right of Congress to make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union, the exercise of the power expressly granted to govern the territories is not without limitations. Speaking of this power, Mr. Justice Curtis, in the case of *Sandford* v. *Scott,* (19 How. 614,) said:

"If, then, this clause does contain a power to legislate respecting the territory, what are the limits of that power?

"To this I answer that, in common with all the other legislative powers of Congress, it finds limits in the express prohibitions on Congress not to do certain things; that, in the exercise of the legislative power, Congress cannot pass an *ex post facto* law or bill of attainder; and so in respect to each of the other prohibitions contained in the Constitution."

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes* v. *Bidwell, supra.*

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case, the practical question is, must Congress, in establishing a system for trial of crimes and offences committed in the Philippine Islands,

carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without Congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States, carefully refrained from so doing; for it is expressly provided that (Article IX) "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government, (32 Stat. 691,) there is express provision that section eighteen hundred and ninety-one of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States.

The requirements of the Constitution as to a jury are found in article 3, section 2:

"The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the States where such crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."

And in article six of the amendments to the Constitution:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury, of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

It was said in the *Mankichi case*, *supra*, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. (Opinion of Mr. Justice White, p. 220, citing *Hurtado* v. *California*, 110 U. S. 516; *Ross' case*, 140 U. S. 453, 473; *Boller* v. *Nebraska*, 176 U. S. 83, and cases cited on page 86; *Maxwell* v. *Dow*, 176 U. S. 581, 584; *Downes* v. *Bidwell*, 182 U. S. 244.)

In the same case Mr. Justice Brown, in the course of his opinion, said:

"We would even go farther, and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well being."

As we have had occasion to see in the case of *Kepner* v. *United States*, decided, *ante*, p , the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new government the guarantees of the bill of rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry and whose judgments were not final until passed in review before the audiencia or Superior Court, with right of final review and power to grant a new trial for errors of law in the Supreme Court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President and sanctioned by act of Congress, (Act of July, 1, 1902, 32 Stat. 691,) has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offence without due process of law, nor be put twice in jeopardy of punishment for the same offence, nor be compelled in any criminal case to be a witness against himself. As appears in the Kepner case, *ante*, the accused is given the right of appeal from the judgment of the court of first instance to the Supreme Court, and, in capital cases, the case goes to the latter court without appeal. It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings, which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial,

either of their own force or as limitations upon the power of Congress in setting up a government, must rested in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories?

The cases cited have firmly established the power of the United States, like other sovereign nations, to acquire, by the methods known to civilized peoples, additional territory. The framers of the Constitution, recognizing the possibility of future extension by acquiring territory outside the States, did not leave to implication alone the power to govern and control territory owned or to be acquired, but in the article quoted expressly conferred the needful power to make regulations. Regulations in this sense must mean laws, for, as well as States, territories must be governed by laws. The limitations of this power were suggested by Mr. Justice Curtis in the Dred Scott case, above quoted, and Mr. Justice Bradley, in the Mormon Church case, (136 U. S. 1,) said:

"Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all power, than by express and direct application of its provisions."

This language was quoted with approbation by Mr. Justice Brown in Downes v Bidwell, supra, and in the same case Mr. Justice White said:

"Whilst, therefore, there is no express or implied limitation by Congress in exercising its power to create local governments for any and all of the territories, by which that body is restrained from the widest latitude of discretion, it does not follow that there may not be inherent, although unexpressed, principles which are the basis of all free government which cannot be with impunity transcended. But this does not support the view that every express limitation of the Constitution which is applicable has not force, but only signifies that even in cases where there is no direct command of the Constitution which applies, there may nevertheless be restrictions of so fundamental a nature that they cannot be transgressed, although not expressed in so many words in the Constitution."

In treating of article 4, section 3, Judge Cooley, in his work on Constitutional Law, says:

"The peculiar wording of the provision [section 3, article 4] has led some persons to suppose that it was intended Congress should exercise, in respect to the territory, the rights only of a proprietor of property, and that the people of the territories were to be left at liberty to institute governments for themselves. It is no doubt most consistent with the general theory of republican institutions that the people everywhere should be allowed self-government; but it has never been deemed a matter of right that a local community should be suffered to lay the foundations of insti-

nations, and erect a structure of government thereon, without the guidance and assistance of a superior authority. Even in the older States, where society is most homogeneous and has known all the elements of dispute and discord, the State reserves to itself the right to shape municipal institutions; and towns and cities are only formed under its direction, and according to the rules and within the limits the State prescribes. With still less reason could the settlers in new territories be suffered to exercise sovereign powers. The practice of the Government, originating before the [illegible] for the protection, and whether the jurisdiction over the district has been acquired by grant from the States, or by treaty with a foreign power, Congress has unquestionably full power to govern it, and the people, except as Congress shall provide for, are not of right entitled to participate in political authority, until the territory becomes a State. Whatever time they are in a condition of temporary pupilage and dependence; and while Congress will be expected to recognize the principle of self-government to such extent as may seem wise, its discretion alone can control the measure by which the participation of the people can be determined." (Cooley, Principles of Constitutional Law, 181.)

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and at which it may depend or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the control of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress by the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which may be decided as questions arise, does not require that both in organizing the initial territory, not made a part of the United States by Congressional action, a

system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated.

Other assignments of error bring further questions before the court which we will proceed to notice. The case was a prosecution for libel brought at the instance of Don Benito Legarda, a member of the Philippine Commission, against the plaintiffs in error, Dorr and O'Brien, who were proprietors and editors of a newspaper published in the city of Manila, known as the "Manila Freedom." It appears that Legarda was the prosecuting witness against one Valdez, editor of a certain Spanish newspaper called the "Miau." At the time of the trial of Valdez, under the Spanish law then in force in the islands, the truth could not be given in defence in a prosecution for criminal libel. Notwithstanding this fact, counsel for Valdez, in the form of an offer of proof, read a paper in court, making certain statements with reference to the libel charged tending to show the truth thereof. In what purported to be a report of the proceeding, the Manila Freedom printed an article containing the matter set forth in the offer to prove, with headlines in large type, as follows:

"TRAITOR, SEDUCER, AND PERJURER.

SENSATIONAL ALLEGATIONS AGAINST COMMISSIONER LEGARDA.

MADE OF RECORD AND READ IN ENGLISH—SPANISH READING WAIVED.

Wife would have killed him.

Legarda pale and nervous."

The prosecution of the plaintiffs in error was based upon the publication of these headlines, which were charged to be a false and malicious libel printed in the English language of and concerning Don Benito Legarda. At the time Valdez was tried, in which case the occurrence undertaken to be reported took place, the Spanish law was in force, denying the right to put in evidence the truth of the alleged libelous matter. At the time of the trial of the plaintiffs in error the Philippine Commission had passed Act No. 277, known as the libel law:

[No. 277.]

"AN ACT defining the law of libel and threats to publish a libel, making libel and threats to publish libel misdemeanors, giving a right of civil action therefor, and making obscene or indecent publications misdemeanors.

"*By authority of the President of the United States, be it enacted by the United States Philippine Commission that:* SEC. 1. A libel is a malicious

defamation, expressed either in writing, printing or by signs or pictures, or the like, or public theatrical exhibitions, tending to blacken the memory of one who is dead or to impeach the honesty, virtue or reputation or publish the alleged or natural defects of one who is alive, and thereby expose him to public hatred, contempt or ridicule.

* * * * * *

"SEC. 4. In all criminal prosecutions for libel the truth may be given in evidence to the court, and if it appears to the court that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; otherwise he shall be convicted; but to establish this defence, not only must the truth of the matter so charged be proven, but also that it was published with good motives and for justifiable ends.

* * * * * *

"SEC. 6. Every author, editor or proprietor of any book, newspaper or serial publication is chargeable with the publication of any words contained in any part of such book or number of each newspaper or serial as fully as if he were the author of the same.

"SEC. 7. No reporter, editor or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative or other public official proceedings, or of any statement, speech, argument or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication.

"SEC. 8. Libelous remarks or comments connected with matter privileged by the last section receive no privilege by reason of being so connected."

* * * * * *

"Enacted October 24, 1901."

The contention is that the publication is privileged under sections 7 and 8, the claim being that the publication was a fair and truthful report of judicial proceedings. Testimony was introduced in the court below tending to show malice, and there was no proof to support the truth of the charges in the alleged libel, which were found to be without basis and wanton, and as the findings of the two lower courts in a cause brought in review here are not ordinarily disturbed, the case upon this branch might rest upon that proposition. It is evident, however, that the publication in question did not stop with a simple report of the judicial proceedings. Indeed, the paper offered in evidence could not have been received under the law then in force—a fact concerning which no comment was made in the report of the proceedings. Furthermore, section 8 of the law, while permitting as privileged a fair and truthful report of judicial proceedings, except upon express proof of malice, does not make privileged libelous remarks or comments in connection with the privileged matter. The draftsman of the law evidently had in mind the law of criminal libel in newspaper publications as it exists in this country. The privilege extends to a full and correct report of judicial proceedings without prejudicial

comment. The rule is nowhere better stated than by Judge Cooley in his work on Constitutional Limitations, 7th ed; p. 637:

"It seems to be settled that a fair and impartial account of judicial proceedings, which have not been *ex parte*, but in the hearing of both parties, is, generally speaking, a justifiable publication. But it is said that if a party is to be allowed to publish what passes in a court of justice, he must publish the whole case, and not merely state the conclusion which he himself draws from the evidence. A plea that the supposed libel was, in substance, a true account and report of a trial has been held bad; and a statement of the circumstances of a trial as from counsel in the case has been held not privileged. The report must also be strictly confined to the actual proceedings in court, and must contain no defamatory observations or comments from any quarter whatsoever, in addition to what forms strictly and properly the legal proceedings."

Many cases are cited by the learned author in support of this conclusion. In *Hayes* v. *Press Co. Limited,* (127 Pa. St. 642,) headlines stating "Hotel Proprietors Embarrassed," in giving an account of a judgment rendered in the suit of a bank against the proprietors of a certain hotel, was held not privileged. In Newell on Defamation, Libel and Slander, section 163, the author says:

"The publisher must add nothing of his own. He must not state his opinion of the conduct of the parties, or impute motives therefor; he must not insinuate that a particular witness committed perjury. That is not a report of what occurred; it is simply his comment on what occurred, and to this no privilege attaches. Often such comments may be justified on another ground—that they are fair and *bona fide* criticism on a matter of public interest, and are therefore not libelous. But such observations, to which quite different considerations apply, should not be mixed up with the history of the case. Lord Campbell said: 'If any comments are made, they should not be made as part of the report. The report should be confined to what takes place in court, and the two things—report and comment—should be kept separate.' And all sensational headings to reports should be avoided." (*Thomas* v. *Crosswell,* 7 Johns. [N. Y.] 264.)

These headlines were not privileged matter at the common law, and were libelous remarks or comments if the matter could be deemed otherwise privileged, within the meaning of section 8 of the Philippine libel law. An inspection of them would seem to be sufficient to demonstrate this fact. The complainant was held up to the public where the paper circulated in striking headlines as "Traitor, Seducer, Perjurer," and while these words were quoted as well as the phrase "Wife would have killed him," their publication in this manner was certainly the equivalent to a remark or comment unnecessary to a fair and truthful report of judicial proceedings, and likely to raise inferences highly detrimental to the character and standing of the one concerning whom they were printed and published.

Further error is assigned in that Act No. 277 of the laws of the Philippine Commission was not passed by competent legal authority. The act was one of the laws of the Philippine Commission, passed by that body by virtue of the authority given the President under the so-called Spooner resolution of March 2, 1901. The right of Congress to authorize a temporary government of this character is not open to question at this day. The power has been frequently exercised and is too well settled to require further discussion. (*De Lima* v. *Bidwell*, 182 U. S. 1, 196.)

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 583.—October Term, 1903.

Fred. L. Dorr and Edward F. O'Brien, Plaintiffs in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31st 1904.]

Mr. Justice Harlan, dissenting:

I do not believe now any more than I did when *Hawaii* v. *Mankichi*, 190 *U. S.* 197, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure and are not fundamental in their nature. In my opinion, guaranties for the protection of life, liberty and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the States composing the Union, or in any territory, however acquired, over the inhabitants of which the Government of the United States may exercise the powers conferred upon it by the Constitution.

The Constitution declares that *no* person, except in the land or naval forces, shall be held to answer for a capital or otherwise infamous crime, except on the presentment or indictment of a grand jury; and forbids the conviction, in a criminal prosecution, of any person, for any crime, except on the unanimous verdict of a petit jury composed of twelve persons. Necessarily, that mandate was addressed to every one committing crime punishable by the United States. This court, however, holds that these provisions are not fundamental and may be disregarded in any territory acquired in the manner the Philippine Islands were acquired, although, as heretofore decided by this court, they could not be disregarded in what are commonly called the organized territories of the United States. *Thompson* v. *Utah*, 170 *U. S.* 343. I cannot assent to this interpretation of the Constitution. It is, I submit, so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution de-

clares that it "shall be the supreme law of the land." But the court in effect adjudges that the Philippine Islands are not part of the "land," within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction—as much so as are the people in the District of Columbia or in the several States of the Union. No power exists in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States. As a Filipino committing the crime of murder in the Philippine Islands may be hung by the sovereign authority of the United States, and as the Philippine Islands are under a civil, not military, government, the suggestion that he may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of the power that the Government may exercise at any time or at any place, is utterly revolting to my mind, and can never receive my sanction. The Constitution, without excepting from its provisions any persons over whom the United States may exercise jurisdiction, declares expressly that "the trial of all crimes, except in cases of impeachment, shall be by jury." It is now adjudged that that provision is not fundamental in respect of a part of the people over whom the United States may exercise full authority. Indeed, it is adjudged, in effect, that the above clause, in its application to this case, is to be construed as if it read: "The trial of all crimes, except in cases of impeachment, *and except where Filipinos are concerned*, shall be by jury." Such a mode of constitutional interpretation plays havoc with the old-fashioned ideas of the fathers, who took care to say that the Constitution was the supreme law—supreme everywhere, at all times, and over all persons who are subject to the authority of the United States. According to the principles of the opinion just rendered, neither the Governor nor any American officer in the Philippines, although citizens of the United States, although under an oath to support the Constitution, and although in those distant possessions for the purpose of enforcing the authority of the United States, can claim, of right, the benefit of the jury provisions of the Constitution, if tried for crime committed on those Islands. There are many thousands of American soldiers in the Philippines. They are there by command of the United States to enforce its authority. They carry the flag of the United States, and have not lost their American citizenship. Yet, if charged in the Philippines with having committed a crime against the United States of which a civil tribunal may take cognizance, they cannot, under the present decision, claim of right a trial by jury. So that, if an American soldier, in discharge of his duty to his country, goes into what some call our "outlying dependencies," he is, it seems, "outside of the Constitution," in respect of a right which this court has said was justly "dear to the American people," and has "always been an

object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy;" a right which, Mr. Justice Story said, was from very early times insisted on by our ancestors in the parent country "as the great bulwark of their civil and political liberties." *Parsons* v. *Bedford*, 3 *Pet.* 433, 466; 2 *Story's Const.* § 1779. Referring to the declaration by a French writer, that Rome, Sparta and Carthage having lost their liberties, those of England must in time perish, Blackstone observed that the writer "should have recollected that Rome, Sparta and Carthage, at the time their liberties were lost, were strangers to the trial by jury." 2 *Bl. Comm.* 379.

In a former case I had occasion to say, and I still think, that "neither the life, nor the liberty, nor the property of *any* person, within any territory or country over which the United States is sovereign, can be taken, under the sanction of any civil tribunal, acting under its authority, by any form of procedure inconsistent with the Constitution of the United States;" that "the Constitution is the supreme law in every territory, as soon as it comes under the sovereign dominion of the United States for purposes of civil administration, and whose inhabitants are under its entire authority and jurisdiction."

My views as to the scope and meaning of those provisions of the Constitution which relate to grand and petit juries, and as to the relations of the United States to our newly acquired possessions, have been more fully stated in cases heretofore decided in this court,* and I have therefore not deemed it necessary in the present case to enter upon a review of the authorities.

I dissent from the opinion and judgment of the court.

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* *Hurtado* v. *California*, 110 *U. S.* 516, 538; *Thompson* v. *Utah*, 170 *U. S.* 343; *Maxwell* v. *Dow*, 176 *U. S.* 581, 605; *Downes* v. *Bidwell*, 182 *U. S.* 244, 375; *Hawaii* v. *Mankichi*, 190 *U. S.* 197, 221, 226.

True copy.

Test:

Clerk Supreme Court, U. S.

33785

Supreme Court of the United States.

No. 583.—October Term, 1903.

Fred. L. Dorr and Edward F. O'Brien vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice Peckham, concurring.

I concur in the result of the opinion of the court in this case, which upholds the conviction of the plaintiffs in error on a trial at Manila, Philippine Islands, for a criminal offence, without a jury. I do so simply because of the decision in *Hawaii* v. *Mankichi*, (190 U. S. 197.) That case was decided by the concurring views of a majority of this court, and although I did not and do not concur in those views, yet the case in my opinion is authority for the result arrived at in the case now before us, to wit, that a jury trial is not a constitutional necessity in a criminal case in Hawaii or in the Philippine Islands. But, while concurring in this judgment I do not wish to be understood as assenting to the view that *Downes* v. *Bidwell*, (182 U. S. 244,) is to be regarded as authority for the decision herein. That case is authority only for the proposition that the plaintiff therein was not entitled to recover the amount of duties he had paid under protest upon the importation of certain oranges from the port of San Juan, in the Island of Porto Rico, in November, 1900, after the passage of the act known as the Foraker act. The various reasons advanced by the judges in reaching this conclusion, which were not concurred in by a majority of the court, are plainly not binding. The Mankichi case is, however, directly in point, and calls for an affirmance of this judgment.

I am authorized to say that the Chief Justice and Mr. Justice Brewer agree in this concurring opinion.

True copy.

Test:

Clerk Supreme Court, U. S.

into the City of New York

See page 16.

33787

Supreme Court of the United States.

Nos. 244 and 584.—October Term, 1903.

Thomas E. Kepner, Plaintiff in Error, vs. The United States. } In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice Day delivered the opinion of the Court.

Thomas E. Kepner, a practicing lawyer in the city of Manila, Philippine Islands, was charged with a violation of the law in the embezzlement of the funds of his client, (*estafa.*) Upon trial, in November, 1901, in the court of of first instance, without a jury, he was acquitted, it being the judgment of the court that he was not guilty of the offence charged. Upon appellate proceedings by the United States to the Supreme Court of the Philippine Islands the judgment of the court of first instance, finding the accused not guilty, was reversed, and Kepner was found guilty and sentenced to a term of imprisonment of one year, eight months and twenty-one days, suspended from any public office or place of trust and deprived of the right of suffrage.

Error was assigned in the appellate court upon the ground that the accused had been put in jeopardy a second time by the appellate proceedings, in violation of the law against putting a person twice in jeopardy for the same offence, and contrary to the Constitution of the United States.

The appeal was taken by the United States on December 20, 1901. A motion to dismiss the appeal was made on January 1, 1902. The motion was finally overruled on October 11, 1902; the final decision in the case, finding the accused guilty and imposing the sentence, was rendered on December 3, 1902.

A proper consideration of the question herein made renders it necessary to notice some of the steps by which the jurisdiction of the courts in which the accused was tried was established.

The United States acquired the Philippine Islands by cession under the treaty of peace executed at Paris, between the United States and Spain, on December 10, 1898, the final ratifications being exchanged April 11, 1899.

The islands after American occupation had been under military rule prior to the creation of the Philippine Commission.

Under the control of the military government, orders had been issued, among others, military order number 58, dated April 23, 1900, which order was in part as follows:

"General Orders, No. 58.

Manila, P. I., April 23, 1900.

"In the interests of justice and to safeguard the civil liberties of the inhabitants of these islands, the criminal code of procedure now in force

thereto is hereby amended to contain of its important provisions as indicated in the following enumerated sections:

* * * * * *

"SEC. 3. All public offenses triable in courts of first instance or in courts of similar jurisdiction, now established or that hereafter may be established, must be prosecuted by complaint or information.

* * * * * *

Rights of accused at the trial.

"SEC. 15. In all criminal prosecutions the defendant shall be entitled:

"1. To appear and defend in person and by counsel at every stage of the proceedings.

"2. To be informed of the nature and cause of the accusation.

"3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice or be used against him.

"4. To be exempt from testifying against himself.

"5. To be confronted at the trial by and to cross-examine the witnesses against him. Where the testimony of a witness for the prosecution has previously been taken down by question and answer in the presence of the accused or his counsel, the defense having had an opportunity to cross-examine the witness, the deposition of the latter may be read upon satisfactory proof to the court that he is dead or insane, or cannot with due diligence be found in the islands.

"6. To have compulsory process issue for obtaining witnesses in his own favor.

"7. To have a speedy and public trial.

"8. To have the right of appeal in all cases.

* * * * * *

"SEC. 43. From all final judgments of the courts of first instance or courts of similar jurisdiction, and in all cases in which the law now provides for appeals from said courts an appeal may be taken to the Supreme Court as hereinafter prescribed. . . .

"SEC. 44. Either party may appeal from a final judgment or from an order made after judgment affecting the substantial rights of the appellant or in any case now permitted by law. The United States may also appeal from a judgment for the defendant sustained on a demurrer to an information or complaint, and from an order dismissing a complaint or information.

* * * * * *

"SEC. 50. It shall not be necessary to forward to the Supreme Court the record, or any part thereof, of any case in which there shall have been an acquittal, or in which the sentence imposed does not exceed confinement in prison for one year, or a fine of 250 pesos, exclusive of costs, unless such case shall have been duly appealed. But such sentence shall be executed upon the order of the court in which the trial was had. The record in cases in which the death penalty, or imprisonment exceeding one year, or a fine exceeding 250 pesos, exclusive of costs of trial, shall have been imposed, shall be forwarded to the clerk of the criminal branch of the Supreme Court within twenty days, but not earlier than fifteen days after the rendition of the sentence. All cases involving sentence of death, or of imprisonment exceeding six years, or of fine exceeding 2,250 pesos

or in which an appeal shall have been taken shall be admitted to the criminal branch of the Supreme Court and shall thereafter take his oath as is now provided by law. [...] [...] involving sentence for other than [illegible] and no appeal, shall be referred by the clerk to the assistant chief for consideration, and if the latter retain the same supporting in the sentence imposed, the record shall immediately be returned to the trial court for execution of sentence. If the assistant chief shall not concur in the sentence he case shall be submitted to the criminal branch of the Supreme Court, and shall thereafter take the same course as is now provided by law when the officer shall recommend a sentence in any respect more severe than that imposed by the trial judge, and for the consideration of the court, without the necessity of a further defense or hearing. [...] that officer recommends a lighter sentence."

This order was amended by an act of the commission (No. 916), passed August 16, 1901, and is as follows:

"[...] No. 916. An act conferring jurisdiction on justices of the peace &c.

"SEC. 1. Every justice of the peace in the Philippine Islands is hereby invested with authority to make preliminary investigations of any crime alleged to have been committed within the territorial jurisdiction of his and thereupon which is by law cognizable to the judges of courts of first instance. [...]

"SEC. 2. So much of section [illegible] of said general order number [illegible] as requires courts of first instance to forthwith transmit to the Supreme Court or the assistant chief the record of all criminal cases for review or consideration, except where the death penalty is imposed or the judgment or part of the judgment of such court of first instance is hereby appealed, and it shall not be necessary to transmit to the Supreme Court or the assistant chief the record in any case thereof, or any case in which there shall have been an acquittal, or in which the penalty imposed is not death, unless such case shall have been duly appealed as provided in such order. The record of all cases in which the death penalty shall have been imposed by any court of first instance, whether the judgment shall have been appealed or not, shall be forwarded to the Supreme Court for investigation and judgment as law and justice shall dictate."

[...] was amended by the second order as to appeal by the accused. [...] [illegible] June 11, 1901:

"SEC. 2. The judicial power of the government of the Philippine Islands shall be vested in a Supreme Court, courts of first instance, and courts of justices of the peace, together with such special jurisdiction in municipal courts and other special tribunals as may be established by law. The [illegible] courts first named shall be courts of record.

[illegible]

"SEC. 10. The jurisdiction of the Supreme Court shall be as follows:

"1. Original, and

"2. Appellate.

"SEC. 12. The Supreme Court shall have original jurisdiction in [illegible] and mandamus, [illegible] and [illegible] to [illegible] and in the manner provided in [illegible]

and to hear and determine the controversies thus brought before it, and in other cases provided by law.

"SEC. 18. The Supreme Court shall have appellate jurisdiction of all actions and special proceedings properly brought to it from courts of first instance, and from other tribunals from whose judgment the law shall specially provide an appeal to the Supreme Court.

"SEC. 19. The Supreme Court shall have power to issue writs of certiorari and all other auxiliary writs and process necessary to the complete exercise of its original or appellate jurisdiction.

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"SEC. 39. The existing audiencia or Supreme Court is hereby abolished, and the Supreme Court provided by this act is substituted in place thereof.

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"SEC. 55. The jurisdiction of courts of first instance shall be of two kinds:

"1. Original; and

"2. Appellate.

"SEC. 56. Courts of first instance shall have original jurisdiction. . . . 6. In all criminal cases in which a penalty of more than six months' imprisonment or a fine exceeding one hundred dollars may be imposed.

* * * * * *

"SEC. 65. The existing courts of first instance are hereby abolished, and the courts of first instance provided by this act are substituted in place thereof.

"SEC. 66. There shall be courts of justice of the peace as in this section provided:

"1. The existing courts of justices of the peace, established by military orders since the thirteenth day of August, eighteen hundred and ninety-eight, are hereby recognized and continued, and the justices of such courts shall continue to hold office during the pleasure of the commission.

"2. In every province in which there now is, or shall hereafter be established, a court of first instance, courts of justice of the peace shall be established in every municipality thereof which shall be organized under the municipal code, or which has been organized and is being conducted as a municipality when this act shall take effect, under and by virtue of the municipal code.

* * * * * *

"SEC. 68. A justice of the peace shall have original jurisdiction for the trial of all misdemeanors and offences arising within the municipality of which he is a justice, in all cases where the sentence might not by law exceed six months' imprisonment or a fine of one hundred dollars; . . ."

On July 1, 1902, Congress passed an act (32 Stat. 691):

"Act of Congress of July 1, 1902, 'temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes.'

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the action of the President of the United States in creating the Philippine Commission and authorizing said commission to exercise the powers of government to the extent and in the manner and form and subject to the regulation and control set

forth in the instructions of the President to the Philippine Commission, dated April seventh, nineteen hundred, and in creating the offices of civil governor and vice governor of the Philippine Islands, and authorizing said civil governor and vice governor to exercise the powers of government to the extent and in the manner and form set forth in the executive order dated June twenty-first, nineteen hundred and one, and in establishing four executive departments of government in said islands as set forth in the act of the Philippine Commission, entitled 'An act providing an organization for the departments of the interior, of commerce and police, of finance and justice, and of public instruction,' enacted September sixth, nineteen hundred and one, is hereby approved, ratified, and confirmed, and until otherwise provided by law the said islands shall continue to be governed as thereby and herein provided, and all laws passed hereafter by the Philippine Commission shall have an enacting clause as follows: 'By authority of the United States be it enacted by the Philippine Commission.' The provisions of section eighteen hundred and ninety-one of the Revised Statutes of eighteen hundred and seventy-eight shall not apply to the Philippine Islands.

"Future appointments of civil governor, vice governor, members of said commission, and heads of executive departments shall be made by the President, by and with the advice and consent of the Senate.

* * * * * *

"SEC. 5. That no law shall be enacted in said islands which shall deprive any person of life, liberty or property without due process of law, or deny to any person therein the equal protection of the laws.

"That in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses face to face, and to have compulsory process to compel the attendance of witnesses in his behalf.

"That no person shall be held to answer for a criminal offence without due process of law; and no person for the same offence shall be twice put in jeopardy of punishment, nor shall be compelled in any criminal case to testify against himself.

"That all persons shall before conviction be bailable by sufficient sureties, except for capital offences.

"That no law impairing the obligation of contracts shall be enacted.

"That no person shall be imprisoned for debt.

"That the privilege of the writ of *habeas corpus* shall not be suspended, unless, when in cases of rebellion, insurrection or invasion the public safety may require it, in either of which events the same may be suspended by the President, or by the governor, with the approval of the Philippine Commission, whenever during such period the necessity for such suspension shall exist.

"That no *ex post facto* law or bill of attainder shall be enacted.

"That no law granting a title of nobility shall be enacted, and no person holding any office of profit or trust in said islands shall, without the consent of the Congress of the United States, accept any present, emolument, office or title of any kind whatever from any king, queen, prince or foreign State.

"That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

"That the right to be secure against unreasonable searches and seizures shall not be violated.

"That neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in said islands.

"That no law shall be passed abridging the freedom of speech or of the press, or the right of the people peaceably to assemble and petition the Government for redress of grievances.

"That no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed.

"That no money shall be paid out of the treasury except in pursuance of an appropriation by law.

"That the rule of taxation in said islands shall be uniform.

"That no private or local bill which may be enacted into law shall embrace more than one subject, and that subject shall be expressed in the title of the bill.

"That no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

"That all money collected on any tax levied or assessed for a special purpose shall be treated as a special fund in the treasury and paid out for such purpose only.

* * * * * *

"SEC. 9. That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the government of said islands, subject to the power of said Government to change the practice and method of procedure. The municipal courts of said islands shall possess and exercise jurisdiction as heretofore provided by the Philippine Commission, subject in all matters to such alteration and amendment as may be hereafter enacted by law; and the chief justice and associate justices of the Supreme Court shall hereafter be appointed by the President, by and with the advice and consent of the Senate, and shall receive the compensation heretofore prescribed by the commission until otherwise provided by Congress. The judges of the court of first instance shall be appointed by the civil governor, by and with the advice and consent of the Philippine Commission: *Provided*, That the admiralty jurisdiction of the Supreme Court and courts of first instance shall not be changed except by act of Congress.

"SEC. 10. That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify or affirm the final judgments and decrees of the Supreme Court of the Philippine Islands in all actions, cases, causes and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified or affirmed

by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States."

The act just quoted became a law before the final conviction of the accused in the Supreme Court of the islands.

It is contended by the Government that that part of the law under immediate consideration, which provides that no person, for the same offence, shall be twice put in jeopardy, must be construed in view of the system of laws prevailing in the islands before the same were ceded to the United States, and that the purpose of Congress was to make effectual the jurisprudence of the islands as known and established before American occupation, and that the provision against double jeopardy must be read in the light of the understanding of that expression in the civil law, or rather the Spanish law as it was then in force.

The citations in the brief of the learned counsel for the Government seem to establish that under the Spanish law, as theretofore administered, one who had been convicted by a judgment of the court of last resort could not again be prosecuted for the same offence. We notice some of these provisions:

In Spanish law the doctrine found expression in the Fuero Real (A. D. 1255) and the Siete Partidas (A. D. 1263).

"After a man, accused of any crime, has been acquitted by the court, no one can afterwards accuse him of the same offence (except in certain specified cases). Fuero Real, lib. iv, tit. xxi, 1, 13.

"If a man is acquitted by a valid judgment of any offence of which he has been accused, no other person can afterwards accuse him of the offence (except in certain cases). Siete Partidas, Part. VII, tit. i, l. xii."

In the encyclopedia of Spanish law, published by Don Lorenzo Arrazola in 1848, it is said, in considering the persons who may be accused of crime:

"It is another of the general exceptions that a person cannot be accused who has formerly been accused and adjudged of the same crime, since the most essential effect of all judicial decisions upon which execution can issue is to constitute unalterable law. Tomo I, pag. 511."

Under that system of law it seems that a person was not regarded as being in jeopardy in the legal sense until there had been a final judgment in the court of last resort. The lower courts were deemed examining courts, having preliminary jurisdiction, and the accused was not finally convicted or acquitted until the case had been passed upon in the audiencia, or Supreme Court, whose judgment was subject to review in the Supreme Court at Madrid for errors of law, with power to grant a new trial. The trial was regarded as one continuous proceeding, and the protection given was against a second conviction after this final trial had been concluded in

due form of law. The change introduced under military order No. 58, as amended by act 194 of the commission, made the judgment of the court of first instance final, in cases other than capital, whether the accused be convicted or acquitted, unless an appeal was prosecuted by the Government or the accused in the manner pointed out.

In order to determine what Congress meant in the language used in the act under consideration, "No person for the same offence shall be twice put in jeopardy of punishment," we must look to the origin and source of the expression and the judicial construction put upon it before the enactment in question was passed. A consideration of the events preceding this regulation makes evident the intention of Congress to carry some at least of the essential principles of American constitutional jurisprudence to these islands and to engraft them upon the law of this people, newly subject to our jurisdiction.

That it was the intention of the President in the instructions to the Philippine Commission to adopt a well-known part of the fundamental law of the United States, and to give much of the beneficent protection of the bill of rights to the people of the Philippine Islands, is not left to inference, for in his instructions, dated April 7, 1900, (see Public Laws and Resolutions of Philippine Com., 6–9,) he says:

"In all the forms of government and administrative provisions which they are authorized to prescribe, the commission should bear in mind that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government;"

But he was careful to add:

"At the same time the commission should bear in mind, and the people of the islands should be made plainly to understand, that there are certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom, and of which they have, unfortunately, been denied the experience possessed by us; that there are also certain practical rules of government which we have found to be essential to the preservation of these great principles of liberty and law, and that these principles and these rules of government must be established and maintained in their islands for the sake of their liberty and happiness, however much they may conflict with the customs or laws of procedure with which they are familiar. It is evident that the most enlightened thought of the Philippine Islands fully appreciates the importance of these principles and rules, and they will inevitably within a short time command universal assent. Upon every division and branch of the government of the Philippines, therefore, must be imposed these inviolable rules:

"That no person shall be deprived of life, liberty or property without due process of law; that private property shall not be taken for public

use without just compensation; that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence; that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted; that no person shall be put twice in jeopardy for the same offence or be compelled in any criminal case to be a witness against himself; that the right to be secure against unreasonable searches and seizures shall not be violated; that neither slavery nor involuntary servitude shall exist except as a punishment for crime; that no bill of attainder or *ex post facto* law shall be passed; that no law shall be passed abridging the freedom of speech or of the press or of the rights of the people to peaceably assemble and petition the government for a redress of grievances; that no law shall be made respecting an establishment of religion or prohibiting the free exercise thereof, and that the free exercise and enjoyment of religious profession and worship without discrimination or preference shall forever be allowed."

These words are not strange to the American lawyer or student of constitutional history. They are the familiar language of the Bill of Rights, slightly changed in form, but not in substance, as found in the first nine amendments to the Constitution of the United States, with the omission of the provision preserving the right to trial by jury and the right of the people to bear arms, and adding the prohibition of the Thirteenth Amendment against slavery or involuntary servitude except as a punishment for crime, and that of Art. 1, § 9, to the passage of bills of attainder and *ex post facto* laws. These principles were not taken from the Spanish law; they were carefully collated from our own Constitution, and embody almost verbatim the safeguards of that instrument for the protection of life and liberty.

When Congress came to pass the act of July 1, 1902, it enacted, almost in the language of the President's instructions, the Bill of Rights of our Constitution. In view of the expressed declaration of the President, followed by the action of Congress, both adopting, with little alteration, the provisions of the Bill of Rights, there would seem to be no room for argument that in this form it was intended to carry to the Philippine Islands those principles of our Government which the President declared to be established as rules of law for the maintenance of individual freedom, at the same time expressing regret that the inhabitants of the islands had not theretofore enjoyed their benefit.

How can it be successfully maintained that these expressions of fundamental rights, which have been the subject of frequent adjudication in the courts of this country, and the maintenance of which has been ever deemed essential to our Government, could be used by Congress in any other sense than that which has been placed upon them in construing the instrument from which they were taken?

It is a well-settled rule of construction that language used in a statute which has a settled and well-known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. (*The Abbotsford*, 98 U. S. 440.)

It is not necessary to determine in this case whether the jeopardy provision in the Bill of Rights would have become part of the law of the islands without Congressional legislation. The power of Congress to make rules and regulations for territory incorporated in or owned by the United States is settled by an unbroken line of decisions of this court and is no longer open to question. (*American Ins. Co.* v. *Canter*, 1 Pet. 511; *Murphy* v. *Ramsay*, 114 U. S. 15; *Mormon Church* v. *United States*, 136 U. S. 1, 42, 43; *Downs* v. *Bidwell*, 182 U. S. 244: *Hawaii* v. *Mankichi*, 190 U. S. 197.) This case does not call for a discussion of the limitations of such power, nor require determination of the question whether the jeopardy clause became the law of the islands after the ratification of the treaty without Congressional action, as the act of Congress made it the law of these possessions when the accused was tried and convicted.

It is argued that in the act of July 1, 1902, Congress recognized the jurisdiction of the Philippine courts in section 9 as follows:

"SEC. 9. That the Supreme Court and the courts of first instance of the Philippine Islands shall possess and exercise jurisdiction as heretofore provided, and such additional jurisdiction as shall hereafter be prescribed by the the government of said islands, subject to the power of said government to change the practice and method of procedure."

The argument is, that Congress intended to leave the right of appeal as provided by military order, No. 58, as amended by the commission, in full force.

But Congress, in section 5, had already specifically provided that no person should be put twice in jeopardy of punishment for the same offence. While section 9 recognizes the established jurisdiction of the courts of the islands, it was not intended to repeal the specific guaranty of section 5, which is direct legislation pertaining to the particular subject. It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling. (*In re Rouse, Hazard & Co.*, 91 Fed. Rep. 97–100, and cases therein cited; *Townsend* v. *Little*, 109 U. S. 504, 512.)

In ascertaining the meaning of the phrase taken from the Bill of Rights it must be construed with reference to the common law from which it was taken. 1 Kent Com. 336. *United States* v. *Wong Kim Ark*, (169 U. S. 649,) in which this court said:

"In this, as in other respects, it [a constitutional provision] must be interpreted in the light of the common law, the principles and history of which were familarly known to the framers of the Constitution. (*Minor* v. *Happersett*, 21 Wall. 162; *Ex parte Wilson*, 144 U. S. 417; *Boyd* v. *United States*, 116 U. S. 616, 624, 625; *Smith* v. *Alabama*, 624 U. S. 465.) The language, as has been well said, could not be understood without reference to the common law. (1 Kent. Com. 336; Bradley, J., in *Moore* v. *United States*, 91 U. S. 270, 274.)"

At the common law, protection from second jeopardy for the same offence clearly included immunity from second prosecution where the court having jurisdiction had acquitted the accused of the offence. The rule is thus stated by Hawkins, Pleas of the Crown, quoted by Mr. Justice Story in *United States* v. *Gilbert et al.*, (2 Sumner, 39):

"The plea (says he) of *autre fois acquit* is grounded on this maxim, that a man shall not be brought into danger of his life for one and the same offence more than once. From whence it is generally taken by all our books, as an undoubted consequence, that where a man is once found not guilty, on an indictment or appeal, free from error, and well commenced before any court, which hath jurisdiction of the cause, he may by the common law, in all cases, plead such acquittal in bar of any subsequent indictment or appeal for the same crime."

In this court it was said by Mr. Justice Miller, in *Ex parte Lange*, (18 Wall. 163):

"The common law not only prohibited a second punishment for the same offence, but went further and forbid a second trial for the same offence, whether the accused had suffered punishment or not, and whether in the former trial he had been acquitted or convicted."

And in as late a case as *Wemyss* v. *Hopkins*, (L. R. 10 Q. B. 378,) it was held that a conviction before a court of competent jurisdiction, even without a jury, was a bar to a second prosecution.

In that case the appellant had been summarily convicted before a magistrate for negligently and by wilful misconduct driving a carriage against a horse ridden by the respondent, and was afterwards convicted on the same facts for unlawful assault. It was held that the first conviction was a bar to the second. In the course of the opinion it was said by Blackburn, J.:

"I think the fact that the appellant had been convicted by justices under one act of Parliament for what amounted to an assault is a bar to a conviction under another act of Parliament for the same assault. The defence does not arise on a plea of *autre fois convict*, but on the well-established rule at common law, that where a person has been convicted and punished for an offence by a court of competent jurisdiction, *Transit in rem judicatum*, that is, the conviction shall be a bar to all further proceedings for the same offence, and he shall not be punished again for the same

matter; otherwise there might be two different punishments for the same offence. The only point raised is whether a defence in the nature of a plea of *autre fois convict* would extend to a conviction before two justices whose jurisdiction is created by statute. I think the fact that the jurisdiction of the justices is created by statute makes no difference. Where the conviction is by a court of competent jurisdiction it matters not whether the conviction is by a summary proceeding before justices or by trial before a jury."

In the same case it was said by Lush, J.: "I am also of opinion that the second conviction should be quashed, upon the ground that it violated a fundamental principle of law, that no person shall be prosecuted twice for the same offence. The act charged against the appellant on the first occasion was an assault upon the respondent while she was riding a horse on the highway, and it therefore became an offence for which the appellant might be punished under either of two statutes. The appellant was prosecuted for the assault and convicted under one of the statutes, 3 and 4, Wm. IV, c. 50, s. 78, and fined, and he therefore cannot be afterwards convicted again for the same act under the other statute."

It is true that some of the definitions given by the text-book writers, and found in the reports, limit jeopardy to a second prosecution after verdict by a jury; but the weight of authority, as well as decisions of this court, have sanctioned the rule that a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him, certainly so after acquittal. (*Coleman* v. *Tennessee*, 97 U. S. 509.) Undoubtedly in those jurisdictions where a trial of one accused of crime can only be to a jury, and a verdict of acquittal or conviction must be by a jury, no legal jeopardy can attach until a jury has been called and charged with the deliverance of the accused. But, protection being against a second trial for the same offence, it is obvious that where one has been tried before a competent tribunal having jurisdiction he has been in jeopardy as much as he could have been in those tribunals where a jury is alone competent to convict or acquit. (*People* v. *Miner*, 144 Ill. 308; *State* v. *Bowen*, 45 Minn. 145; *State* v. *Layne*, 96 Tenn. 668.)

In *United States* v. *Sanges*, (144 U. S. 310,) it was held that a writ of error did not lie in favor of the United States in a criminal case, Mr. Justice Gray said:

"From the time of Lord Hale to that of Chadwick's case, just cited, the text-books, with hardly an exception, either assume or assert that the defendant (or his representative) is the only party who can have either a new trial or a writ of error in a criminal case; and that a judgment in his favor is final and conclusive. See 2 Hawk. c. 47, sec. 12; c. 50, sec. 10 *et seq.*; Bac. Ab. Trial, L. 9, Error, B; 1 Chit. Crim. Law, 657, 747; Stark. Crim. Pl. (2d ed.) 357, 367, 371; Archb. Crim. Pl. (12th Eng. and 6th Am. ed.) 177, 179.

"But whatever may have been, or may be, the law of England upon that question, it is settled by an overwhelming weight of American authority that the State has no right to sue out a writ of error upon a judgment in favor of the defendant in a criminal case, except under and in accordance with express statutes, whether that judgment was rendered upon a verdict of acquittal, or upon the determination by the court of a question of law."

In the course of the opinion Justice Gray cites, among other cases, *Com.* v. *Commings* and *Same* v. *McGinnis*, opinion by Chief Justice Shaw, (3 Cush. 212.) In Archbold Cr. Pl. & Pr., Pomeroy's ed., 199, it was said: "There is no instance of error being brought upon a judgment for a defendant after an acquittal."

That the learned justice could not have intended to intimate that a second prosecution could be allowed by statute after an acquittal of the offence is shown by the subsequent decision of this court in *United States* v. *Ball*, (163 U. S. 662,) in which Mr. Justice Gray also delivered the opinion of the court. In that case an attempt was made to prosecute for the second time one Millard F. Ball, who had been acquitted upon a defective indictment, which had been held bad upon the proceedings in error prosecuted by others jointly indicted with Millard F. Ball, who had been convicted at the trial. The court below held Ball's plea of former jeopardy to be bad. But this court reversed the judgment, and in the course of the opinion it was said:

"The Constitution of the United States, in the Fifth Amendment, declares: 'Nor shall any person be subject to be twice put in jeopardy of life or limb.' The prohibition is not against being twice punished, but against being twice put in jeopardy; and the accused, whether convicted or acquitted, is equally put in jeopardy at the first trial. An acquittal before a court having no jurisdiction is, of course, like all the proceedings in the case, absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offence. (*Commonwealth* v. *Peters*, 12 Met. 387; 2 Hawk. P. C. c. 35, sec. 3; 1 Bishop's Crim. Law, sec. 1028.) But although the indictment was fatally defective, yet, if the court had jurisdiction of the cause and of the party, its judgment is not void, but only voidable by writ of error; and, until so voided, cannot be collaterally impeached. If the judgment is upon a verdict of guilty, and unreversed, it stands good and warrants the punishment of the defendant accordingly, and he could not be discharged by a writ of *habeas corpus*. (*Ex parte Parks*, 93 U. S. 18.) If the judgment is upon an acquittal, the defendant, indeed, will not seek to have it reversed, and the government cannot. (*United States* v. *Sanges*, 144 U. S. 310.) But the fact that a judgment of a court having jurisdiction of the case is practically final affords no reason for allowing its validity and conclusiveness to be impugned in another case. . . . *As to the defendant who had been acquitted by the verdict duly returned and received, the court could take no other action than to order his discharge. The verdict of acquittal was final, and could not be reviewed, on error or otherwise, without putting him twice in jeop-*

pardy, and thereby violating the Constitution. However it may be in England, in this country a verdict of acquittal, although not followed by judgment, is a bar to a subsequent prosecution for the same offence. (*United States* v. *Sanges*, 144 U. S. 310; *Commonwealth* v. *Tuck*, 20 Pick. 356, 365; *West* v. *State*, 2 Zabriskie, [22 N. J. Law] 212, 231; 1 Lead. Crim. Cas. 532.)"

It is, then, the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered, although no judgment be entered on the verdict, and it was found upon a defective indictment. The protection is not, as the court below held, against the peril of second punishment, but against being again tried for the same offence.

We are not here dealing with those statutes which give to the Government a right of review upon the steps merely preliminary to a trial and before the accused is legally put in jeopardy, as where a discharge is had upon motion to quash or a demurrer to the indictment is sustained before jeopardy has attached. Such statutes have been quite generally sustained in jurisdictions which deny the right of second trial where a competent court has convicted or acquitted the accused. (*People* v. *Webb*, 38 Cal. 467.) Mr. Bishop, in his work upon Criminal Law, sums up the scope and authority of such statutes as follows:

"A legislative provision for the rehearing of criminal causes cannot be interpreted—or, at least, it cannot have force—to violate the constitutional rule under consideration, whatever be the words in which the provision is expressed. When, therefore, a defendant has been once in jeopardy, the jeopardy cannot be repeated without his consent, whatever statute may exist on the subject. Such a statute will be interpreted with the Constitution, and be held to apply only to cases where it constitutionally may. And if it undertakes to give to the State the right of appeal, to retry the party charged, after acquittal, it is invalid. And so the writ of error, or the like, allowed to the State, can authorize the State to procure the reversal of erroneous proceedings and commence anew, only in those cases in which the first proceeding did not create legal jeopardy." (1 Bishop Criminal Law, fifth ed. sec. 1026.)

The author's conclusion has support in the case of *People* v. *Miner*, (144 Ill. 308, *supra*,) wherein a statute giving an appeal when the accused had been acquitted before a competent tribunal, was held in violation of section 10, article 2, of the constitution of that State, providing that no person shall be put twice in jeopardy for the same offence. So in the case of *People* v. *Webb*, (38 Cal. 467,) a statute undertaking to give the right of appeal to the people in criminal cases was held to be limited to the cases in which errors in the proceedings may occur before legal jeopardy has attached. In the course of a well-considered opinion it was said:

"The question thus presented is of most grave importance, and, so far as we are advised, has never been directly passed upon by this court, hence we have given it a most patient consideration, and after a careful exam-

ination of the authorities as to the construction of similar provisions in the constitutions of other States, and the Constitution of the United States, we are entirely satisfied that this court has no authority in criminal cases, under our State constitution, to order a new trial of a defendant at the instance of the prosecution for mere errors in the ruling of the court during the progress of the trial after the jury have been charged with the case and have rendered a verdict of not guilty. No case has been called to our attention, and after a most diligent examination of authorities, we have not been able to find a single American case where a retrial has been ordered or sanctioned by an appellate court at the instance of the prosecution, after the defendant had once been put upon his trial for an alleged felony, upon a valid indictment before a competent tribunal and acquitted by the verdict of such jury; but we find a vast number of adjudications of the highest judicial tribunals of the different States and many of the Federal courts to the effect that no such retrial is allowed by the common law, and is directly interdicted by the Constitution of the United States, and also of most of the several States. The universal maxim of the common law of England, as Sir William Blackstone expresses it, '*that no man is to be brought into jeopardy of his life more than once for the same offence,*' is embraced in article V of amendments to the Constitution of the United States, and in the constitutions of several States, in the following language: '*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;*' and in many other States the same principle is incorporated in the organic law, in language the same as hereinbefore quoted from the constitution of this State. While the constitutions of some few States are destitute of this or any similar provision, other State constitutions, such as of New Hampshire, Rhode Island, New Jersey and Iowa, merely interdict a second trial for the same offence after acquittal."

The case of *State* v. *Lee*, (65 Conn. 265,) in the reasoning of the court seems opposed to this view. But no reference is made in the course of the opinion to any constitutional requirement in Connecticut as to double jeopardy. An examination of the constitution of that State and amendments as published in General Statutes of Connecticut Revision of 1902, discloses no provision upon the subject of jeopardy, and we conclude there is none.

The exceptional character of the decision in *State* v. *Lee* is stated by the learned editor of American State Reports in a note to the case as reported in 48 Am. State Rep. 202, in the following language:

"This case, in its view of former jeopardy, stands out in bold relief against the commonly understood meaning of what constitutes once in jeopardy."

And further:

"The law almost universally prevalent is that a verdict of acquittal in a criminal case is final and conclusive, and that there can be no new trial of a criminal prosecution after an acquittal in it." (*People* v. *Corning*, 2 N. Y. 9; 49 Am. Dec. 364 and note; 48 Am. State Rep. 213–214.)

The Ball case (163 U. S. *supra*) establishes that to try a man after a verdict of acquittal is to put him twice in jeopardy, although the verdict was not followed by judgment. That is practically the case under consideration, viewed in the most favorable aspect for the Government. The

court of first instance, having jurisdiction to try the question of the guilt or innocence of the accused, found Kepner not guilty; to try him again upon the merits, even in an appellate court, is to put him a second time in jeopardy for the same offence, if Congress used the terms as construed by this court in passing upon their meaning. We have no doubt that Congress must be held to have intended to have used these words in the well-settled sense as declared and settled by the decisions of this court.

It follows that military order No. 58, as amended by act of the Philippine Commission No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, was repealed by the act of Congress of July, 1902, providing immunity from second jeopardy for the same criminal offence.

This conclusion renders it unnecessary to consider, if the question was presented in this case, whether the accused was entitled to the right of a trial by jury.

Judgment reversed and prisoner discharged.

No. 584.

Secundino Mendezona y Mendezona, Plaintiff in Error, *vs.* The United States.	In error to the Supreme Court of the Philippine Islands.

[May 31, 1904.]

Mr. Justice DAY delivered the opinion of the Court.

This case involves the question just decided in *Kepner* v. *United States.* The plaintiff in error was acquitted in the court of first instance and convicted in the Supreme Court of the Philippine Islands.

For the reasons stated in the Kepner case, the judgment herein is reversed, and the prisoner discharged.

Dissenting: Mr. Justice BROWN, Mr. Justice WHITE, Mr. Justice MCKENNA and Mr. Justice HOLMES.

True copy.

Test:

Clerk Supreme Court, U. S.